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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1926

No.

JOSEPH E. MARRON, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals for the Ninth Circuit

To the Honorable William Howard Taft, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Part I.

I.

Petitioner herein deeming himself aggrieved by a decision of the Circuit Court of Appeals for the Ninth Circuit in a case in which he was the plaintiff in

error and the United States of America was the defendant in error respectfully petitions your Honorable Court to grant a writ of certiorari for the review of said decision and for reasons why such writ of certiorari should be granted he respectfully shows the following:

II.

HISTORY OF THE CASE.

The case arose in the United States District Court for the Northern District of California, Southern Division. Joseph E. Marron, the above named petitioner was indicted together with certain other persons for conspiracy among themselves and with others to the grand jury unknown to commit an offense against the United States. The indictment charged a crime under Section 37 of the Criminal Code of the United States in that the petitioner herein and the other defendants at the City and County of San Francisco in the Southern Division of the Northern District of California on the first day of May, 1923 and up to the filing of the indictment, to-wit: on the 17th of October, 1924, conspired together to violate certain provisions of the Act of Congress of October 28, 1919, commonly known as the National Prohibition Act. (Trans. pages 3-50.)

On the 5th day of January, 1925, after trial in the United States District Court, with the exception of defendant Brand who was acquitted, petitioner, together with George Birdsall, Charles Mahoney, Patrick Kissane and Joseph Gorham, were found

guilty on a general verdict. Subsequently petitioner and the defendants Birdsall, Kissane and Gorham sued out writs of error to review the judgment of conviction and the said judgment was affirmed as to all the defendants with the exception of petitioner and as to him the Court reversed the judgment and directed the lower Court to grant him a new trial. (*Marron v. U. S.*, 8 Fed. Rep., Second Series, page 251.) In accordance with that mandate Marron was again tried in the United States District Court and sued out a writ of error to the United States Circuit Court to review the judgment of conviction upon which said judgment he was sentenced to be imprisoned for two years in the United States Penitentiary at Leavenworth, Kansas, and in addition thereto to pay a fine in the sum of ten thousand dollars ($10,000.00). (Trans. page 84.)

On error to the said Circuit Court of Appeals the judgment of the said District Court was affirmed on December 13, 1926 and a rehearing was denied on the 31st day of January, 1927.

III.

The main contentions of your petitioner before the said Circuit Court of Appeals in substance were, vide (Assignment of Errors, Trans. pages 360-435 inclusive):

1. The constitutional rights of the petitioner Marron under the Fourth and Fifth Amendments to the Constitution of the United States were violated by

the reception into evidence over his objection of his private books of account, papers and documents which said private books of account, papers and documents were in the possession of the United States as the result of an illegal search and seizure.

2. The Court erroneously permitted the witness Neilsen to give evidence which if believed disclosed a separate and distinct conspiracy in no wise related to the conspiracy as alleged in the indictment or the scope of the conspiracy as gathered from the testimony elicited upon the trial (Assignment of Errors, Trans. pages 480-491 inclusive) and that the Court gave to the jury instructions which contained gravely erroneous and prejudicial errors of law upon this particular subject.

IV.

REASONS WHY WRIT SHOULD BE GRANTED.

A. The Circuit Court of Appeals for the Ninth Circuit rendered a decision in conflict with a decision of the Circuit Court of Appeals for the Second Circuit on the same matter.

B. It has decided an important question of general law in a way untenable and in conflict with the weight of authority.

C. It has decided an important question of Federal Law which has not been but should be settled by this Honorable Court.

V.

The said Circuit Court of Appeals refused to consider on the merits the first contention of petitioner, namely, that his constitutional rights under the Fourth and Fifth Amendments to the Constitution of the United States were violated by the reception into evidence over objection of his private books of account, papers and documents upon the ground and for the reason that it erroneously concluded that it was foreclosed from considering such contention by virtue of its former decision on the same point on the first appeal. (*Marron v. U. S.*, 8 Fed. Rep., Second Series, page 251.)

VI.

The first *Marron* decision upon this particular contention was bottomed upon an authority in its own Circuit, namely, *Sayers v. U. S.* (C. C. A.) 2 F. (2d) 146.

VII.

The Circuit Court of Appeals for the Second Circuit in its opinion in the case of *Kirvin v. U. S.*, 5 Fed., Second Series, 282, holds under identical facts to be hereinafter stated that the rights of petitioner under the Fourth and Fifth Amendments to the Constitution of the United States were violated.

VIII.

There is in truth and fact an absolute conflict in the decisions of the Circuit Courts of Appeal for the Ninth and Second Circuits.

IX.

THE FACTS AND THE LAW OF THE MARRON CASE.
8 FED. REP. (2ND) 251.

X.

On the second day of October, 1924 and for some time prior thereto petitioner was the lessee and occupant of those certain premises located at No. 1249 Polk Street in the City and County of San Francisco. On the first day of October, 1924, a Federal Prohibition Agent filed with the United States Commissioner for the Northern District of California his affidavit in the following words and figures, to-wit:

> "United States of America,
> Northern District of California,
> County of Alameda.—ss.
>
> On this 1st day of Oct., 1924, before me, Albert M. Hardie, a United States Commissioner in and for the Northern District of California, personally appeared C. A. Howard, who being first duly sworn, deposes and says:
>
> That he is and at all of the times herein mentioned was a Federal Prohibition Agent and as such makes this affidavit and presents the facts and circumstances hereinafter set out that heretofore came to the personal knowledge of and as positively known to affiant to exist.

That this affidavit is made for the purpose of having issued hereon and hereunder a search-warrant to search the following described premises and place, to wit: 1249 Polk St., San Francisco, Cal., including the entire second floor, flat or club, all rooms, lockers, closets, safes, shelves, sheds, drawers, basement, attic, pantries, cupboards, ice boxes. Entire premises, name of owner, or occupant, Eddie Marron.

That in and upon the aforesaid premises and place and on or about the 22nd day of Sept., 1924, intoxicating liquor as defined by Section 1 of Title II of the Act of October 28, 1919, known as the National Prohibition Act, containing one-half of one per centum or more of alcohol by volume and fit for use for beverage purposes, was then and there and now are kept, sold, possessed and bartered in violation of Title II of the said National Prohibition Act, and particularly in violation of Sections 3 and 21 of said Title II.

That affiant on or about the 22d day of September, 1924, visited the above and foregoing mentioned and described premises and purchased from the person in charge in said premises certain intoxicating liquor, to-wit: Fifteen drinks of Bourbon whiskey for which he paid fifty cents each; description of person in charge of premises: height, 5 ft. 7 in.; weight, about 165 lbs.; age, 47 yrs.; large nose, deep set eyes; slightly gray hair, high cheek bones; male.

That it will be necessary to enter the said premises and place to search the same and every part thereof in order to secure the said intoxicating liquor therein for the United States Government and that it will be impossible to secure the same or any part thereof without the aid and use of a search-warrant.

Wherefore, affiant applies for and prays that a search-warrant to enter the said premises and place and therein to search for the said intoxi-

cating liquor be issued pursuant to the statute in such cases made and provided.

C. A. HOWARD.

Subscribed and sworn to before me this 1st day of October, 1924.

ALBERT M. HARDIE,
United States Commissioner in and for the Northern District of California."

(Trans. pages 55-57.)

XI.

Thereafter and on the first day of October, 1924, a search-warrant was issued by the said United States Commissioner for the Northern District of California based upon the affidavit hereinabove referred to. The search-warrant set forth the usual formal averments and concluded with the following direction:

> "Now, therefore, pursuant to Section 25 of Title II of the said National Prohibition Act, you are hereby authorized and empowered to enter the premises and place mentioned, referred to and described in said affidavit, and every part thereof, in the day or night time and to thoroughly search the same for the following described property, to wit: Intoxicating liquor, to wit, alcohol, (jackass brandy, corn whiskey, wine of pepsin, neuropin, pensin rennin, fermented grape juice), brandy, wine, whiskey, rum, gin, beer, ale, porter, sherry wine, port wine, and spirituous, vinous, malt and fermented liquors, liquids and compounds by whatever name called containing one-half of one per centum or more of alcohol and fit for use for beverage purposes, stills, worms, coils, mashes, goosenecks, hydrometers, essences, caramel, coloring materials, boilers, and if found to seize the same and take it into your possession to

the end that the said property may be thereafter dealt with according to law, and hereof to make due return with written inventory of the property taken by you or any or either of you, within ten days as required by law.

Witness my hand and official seal this 1st day of October, 1924.

ALBERT M. HARDIE,
United States Commissioner in and for the Northern District of California."

(Trans. pages 57-59.)

XII.

A due return was made and the property seized upon the said premises as the result of the search was inventoried upon the back of the search-warrant which inventory described in detail the various brands of alcoholic liquors seized at that time. (Trans. pages 75-76.)

XIII.

At the time of the seizure, however, of this intoxicating liquor the prohibition agents seized and carried away with them a certain ledger referred to in the testimony as the "gray ledger". The ledger purported to be a record of the business carried on at 1249 Polk Street. It showed the gross receipts and expenses and also an inventory of the liquor on hand on said date together with numerous other entries.

XIV.

At the same time and under the same circumstances the said Federal prohibition agents carried away with them numerous private memoranda and private papers of various descriptions principally telephone, gas, electric and water receipts. Neither the said ledger nor any of the other private memoranda were located upon the person of Marron who was not present at the time of the search and seizure or his co-defendant Birdsall who was present at the time the search was made and was subsequently arrested by the Federal Prohibition Officers but on the contrary the said ledger and other memoranda were located in a closet in the premises. (Trans. pages 91-131.) Prior to the time of trial of said cause petitioner Marron made and filed his petition for the return of his various books, papers and documents and made in accordance therewith motions to suppress any evidence that might be given upon the trial. These motions were denied by the lower Court and exceptions to such orders were duly taken. The motions are set forth at length in the Transcript pages 327-354.

XV.

Upon the trial before the United States District Court these various private books of account, papers and documents above referred to were introduced into evidence over petitioner's objections and exceptions duly taken thereon. (Trans. pages 91-131.)

XVI.

The gray ledger in particular was introduced into evidence as United States "Exhibit A" and testimony was given with relation thereto by Federal Prohibition agents and others. (Trans. pages 90-132.)

XVII.

The various objections to this illegal search and seizure of petitioner's private property and their subsequent introduction into evidence are designated as follows:

> "a. The seizure of the said papers, records, books of account and ledgers, was made in contravention of the rights of the petitioner under the Fourth Amendment to the Constitution of the United States of America, for *the reason that said papers, records, books of account and ledger were not particularly described in the search-warrant as things to be seized, as required by the said amendment.*
>
> b. The said papers, records, books of account and ledger were not instruments or fruits of crime, but, on the contrary, were and are the private memoranda, the private property and the private papers, documents and writings of the defendant.
>
> c. The said purported search-warrant only authorized the said Federal Prohibition Agents to search the said premises for the following described personal property, to-wit:
>
> "Intoxicating liquor, to wit, alcohol, brandy, wine, whiskey, rum, gin, beer, ale, porter, sherry wine, port wine, jackass brandy, corn whiskey, wine of pepsin, neuropin, pepsin rennin, fermented grape juice and spirituous, vinous,

malt and fermented liquors, liquids and compounds by whatever name called containing one-half of one per centum or more of alcohol and fit for use for beverage purposes, stills, worms, coils, mashes, goosenecks, hydrometers, essences, caramel, coloring materials, boilers.

d. The said Federal Prohibition Agents above referred to, were at the time of executing the warrant, unlawfully upon the premises and were at said time and said place trespassers in taking the said papers, records, books of account and ledger.

e. The said papers, records, books of account and ledger were not upon the person of the defendant, but on the contrary were located in the said premises, heremabove referred to at a time when the defendant was not present.

f. There was neither identification of the said papers, records, books of account and ledger, nor probable cause alleged in the affidavit for the seizure of the papers, records, books of account and ledger, and that their taking was illegal and void."

XVIII.

The specifications of objections heretofore made from "a" to "f" inclusive deal with and apply to the Fourth and Fifth Amendments to the Constitution of the United States.

XIX.

The contention was made that the admission into evidence of the ledger and various other documents and papers and the consequent testimony thereon was a violation of the Fifth Amendment to the Constitution

of the United States in that your petitioner then and there became in substance and effect the unwilling source of evidence and was therefore compelled to be a witness against himself.

XX.

The Circuit Court of Appeals for the Ninth Circuit in *Marron vs. U. S.*, 8 Fed. Rep. Second Series page 251 decided that;

a. Because the Federal Prohibition Agents had authority to search the premises they had authority to seize everything of evidentiary value which they found.

b. That when the officers entered the premises they found defendant Birdsall in the unlawful possession of liquor and in the act of maintaining a common nuisance and hence that the said Birdsall was committing a misdemeanor in their presence and as an incident to a lawful arrest of Birdsall the agents were justified in searching his person and seizing the evidence of his guilt.

c. That because of the provisions of Section 10 of Title II of the National Prohibition Act (41 St. 312, Sec. 8351i of Barnes' Code 1924 Supp.; U. S. Comp. St., Par. 10138½E), petitioner and his co-defendants were required to keep and maintain such records for the purpose of public inspection at any reasonable time by a commissioner or any of his agents or any public prosecutor or by any person designated by him

and that therefore such a book was not like the private papers of a citizen.

d. That the said ledger and other private memoranda were the means and instruments of crime.

e. That the fact that the papers, books and documents were not particularly described in either the affidavit or search-warrant as provided for by the fourth article of the amendment to the Constitution was immaterial under the circumstances.

XXI.

THE FACTS AND LAW OF KIRVIN v. U. S. A. 5 FED. REP. (2ND) 282.

(1) The Facts:

A search-warrant was issued on the 18th day of December, 1923, by one of the United States Commissioners for the Southern District of New York. The affidavit upon which the search-warrant was issued alleged an unlawful sale of intoxicating liquor upon these premises and concluded with the averment that it was necessary to procure a search-warrant to search the said premises and to seize all intoxicating liquor found therein, together with any books, papers, records or documents pertaining to the sale, possession or transportation of intoxicating liquors.

A search-warrant was thereupon issued on the affidavit above referred to and after describing the premises to be searched directed the officers to search diligently "for said liquors and records" and directed the making of a return if any seizure was made under said warrant.

A seizure was made and resulted in obtaining a quantity of liquor and also a large list of books, papers and records consisting of many telegrams, invoices, receipts and various letters.

(2) The Law:

a. That the affidavit for the search-warrant referred to no record or other private memoranda being used in connection with the sale of alcohol and that there was no description of the records papers or memoranda of any kind.

b. That the failure to so describe these things did not warrant the seizure of them.

c. That such private books of account, papers and memoranda were not means or an instrument of crime although they might be some evidence of crime.

d. All papers and documents which afford evidence that a felony has been committed but which were not the means of committing it are immune from seizure.

e. The fact that the officers who were executing the warrant were lawfully on the premises did not confer upon them the right to seize such papers or records because as to them they had no search-warrant.

f. That by seizing such papers they became trespassers as to those documents.

g. That because the plaintiff in error was arrested at the time the papers were seized that fact did not make the seizure lawful because the papers were not on his person.

h. That there was neither identification of the records nor probable cause alleged in the affidavits for the seizure of the records and that their taking was illegal and therefore void.

XXII.

Your petitioner would also call attention to the fact that both the Marron and the Kirvin decisions relied upon the decision of this Court in *Gouled v. U. S.*, 255 U. S. 310, 41 S. C. T. 261, 65 Law Ed., page 647.

The holding in the *Marron* case that the character of the ledger was changed from a private document to a public record by virtue of the provisions of Section 10 of Title II of the National Prohibition Act has been expressly disapproved in the recent decision by this Honorable Court in *U. S. v. Katz,* 70 L. Ed. 554; U. S. Ct. Advance Opinions, June 15, 1926 in which case it was definitely held that the provisions of the above mentioned section respecting the keeping of records of the sales, etc. of intoxicating liquor was a requirement upon persons permitted to make the sales and not upon persons attempting to make unlawful sales.

XXIII.

The Circuit Court of Appeals for the Ninth Circuit refused to consider the decision in the *Kirvin* case and dismissed the subject with the following language:

> The defendants rely on Kirvin v. U. S. (C. C. A.) 5 F. (2d) 282. It may be conceded that this decision cannot be reconciled with the views above

expressed. We have great respect for the court which handed down this opinion, but we prefer to follow our own precedents. We still think that Sayers v. U. S. (C. C. A.) 2 F. (2d) 146, was correctly decided.

XXIV.

The testimony of the witness Nielsen disclosed a separate and independent conspiracy from the one alleged in the indictment or the scope of the conspiracy as gathered from the testimony and hence the admission of his testimony over objection constituted prejudicial error.

XXV.

Because of the said real conflict of authority and because of the said erroneous rulings of the Circuit Court of Appeals for the Ninth Circuit petitioner respectfully represents that accompanying this petition and as an exhibit thereto is a certified copy of transcript of the entire record in the case including the proceedings of the Circuit Court of Appeals for the Ninth Circuit; and hereunto annexed is petitioner's brief in support of this petition.

Wherefore because of the said real conflict of authority and because of the said erroneous rulings of the Circuit Court of Appeals of the Ninth Circuit as will be more fully expounded in the annexed brief petitioner prays that he be granted by this Honorable Court the Writ of Certiorari pursuant to the provisions of Section 240 of Judicial Code, that the writ

be directed to the United States Circuit Court of Appeals for the Ninth Circuit; that on return duly made to the writ and hearing of the case the judgment of conviction and sentence be reversed.

Dated, San Francisco,
February 19, 1927.

BENJAMIN L. MCKINLEY,
Counsel for Petitioner.

CERTIFICATE OF COUNSELLOR.

I, the undersigned, do hereby certify that in my opinion the foregoing petition is well founded and that it is not interposed for the purpose of delay.

Dated, San Francisco,
February 19, 1927.

BENJAMIN L. MCKINLEY,
Counsel for Petitioner.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1926

No.

JOSEPH E. MARRON, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Part II.

Petitioner proposes to establish the following propositions:

(1) That the Constitutional rights of the petitioner Marron under the Fourth and Fifth Amendments to the Constitution of the United States of America were violated by the reception into evidence, over his objection, of his private books of account, papers and documents, which said private books of

account, papers and documents were in the possession of the United States as the result of an illegal search and seizure.

(2) That *Kirvin v. United States,* 5 Fed. (2d) 282, should be followed as an authority on the facts in the instant case, rather than the first decision in *Marron v. United States,* 8 Fed. (2d) 251.

(3) *Marron v. United States,* 8 Fed. (2d) 251, is in direct conflict with the decision of *Gouled v. U. S.,* 255 U. S. 310; 41 S. Ct. 261; 65 L. Ed. 647 and with *U. S. v. Katz,* 70 L. Ed. 554; U. S. S. Ct. Advance Opinions, June 15, 1926, and should, therefore, be expressly overruled.

(4) The Court erroneously permitted the witness Neilsen to give evidence, which if believed, disclosed a separate and distinct conspiracy in no wise related to the conspiracy as alleged in the indictment, or the scope of the conspiracy as gathered from the testimony, and in that connection gave to the jury instructions which contained gravely erroneous and prejudicial errors of law.

PRELIMINARY STATEMENT.

The petition herein contains a statement of the facts surrounding the seizure of the gray ledger and other private memoranda of petitioner, but it is deemed advisable to amplify that statement to a brief extent by pertinent references to the transcript of the testimony. The testimony of W. F. Whittier, a former prohibition officer of the United States, reflects the

xact situation concerning the search of said premises, nd the seizure thereon, and because his testimony ontains a complete statement of the facts involved n this controversy, we set it forth at length prelimiarily to the discussion of the legal propositions above eferred to.

His testimony is as follows (Trans. pages 90 to 132):

"Direct Examination by Mr. Bonsall.

* * * My position with the Government at that time was Federal prohibition agent. * * * I believe I was present at a raid at 1249 Polk Street, on or about October 2, 1924. I think Agents Lee, Howard and Eldridge were with me at that time. We had a search-warrant for the place. We found liquor at that time. * * *

Exception No. 1.

* * * I found a book on those premises at 1249 Polk Street, in the City and County of San Francisco, on the 2d day of October, 1924, besides the liquor.

Exception No. 2.

Q. I show you this book and ask you if you have ever seen that book before.

Mr. Smith. We object to the introduction of the book or any testimony with respect to it, upon the following grounds:

That the book was taken from the premises at 1249 Polk Street on the 2d day of October, at which time certain prohibition agents were there under and by virtue of a search-warrant. The search-warrant did not authorize the seizure of this book, or of any papers, or of any memorandum, but only authorized the officers in whose possession the warrant was to seize liquors and the various paraphernalia used in the making of liquor.

The search-warrant that I refer to was issued by Albert M. Hardie, United States Commis-

sioner in and for the Northern District of California, on the 1st day of October, 1924. It was issued upon an affidavit that was sworn to before the Commissioner I have already named on the 1st day of October by C. A. Howard, who therein in said affidavit styled himself as a federal prohibition agent. The warrant that I refer to did not in any manner describe this book or any of the papers seized at that time.

We object to the introduction of any evidence concerning this book, or the book, itself, upon the following ground:

That the seizure of the papers, records and books of account and ledger was done in contravention of the rights of the defendant Marron under the Fourth Amendment to the Constitution of the United States of America, for the reason that the said papers, records, and books of account and ledger were not particularly described in the search-warrant as things to be seized, as required by the said amendment.

Second: That the papers, records, and books of account and ledger were not instruments or fruits of crime, but, on the contrary, were and are the private papers and documents and writings of the defendant Marron. That the purported search-warrant only authorized the prohibition agents to search the said premises for the following described personal property, to-wit: Intoxicating liquor, to-wit, alcohol, brandy, wine, whiskey, rum, gin, beer, ale, porter, sherry wine, port wine, jackass brandy, corn whiskey, wine of pepsin, neuropin, pepsin rennin, fermented grape juice, and spiritous, vinous, malt and fermented liquors, liquids and compounds by whatever name called containing one-half of one per centum or more of alcohol and fit for use for beverage purposes; stills, worms, coils, mashes, goosenecks, hydrometers, essences, caramel, coloring materials, boilers.

That the said federal prohibition agents were at the time of the execution of the warrant

aforesaid unlawfully upon the premises, and were at said time and said place trespassers in taking said papers, records, books of account and ledger.

That the papers, records, books of account and ledger were not upon the person of the defendant Marron, but, on the contrary, were located in the said premises hereinabove referred to.

That there was neither identification of the said papers, records, books of account and ledger, nor probable cause alleged in the affidavit that I have heretofore referred to as having been issued by Commissioner Hardie and supported by the affidavit of then Prohibition Agent Howard, for the seizure of the papers, records, books of account, and ledger, and that their taking was illegal and void.

Upon the further ground that the records, papers, and books of account, which are the private and personal writings of the defendant Marron, are immune from seizure, and that the rights of the defendant Marron are also violated under the Fifth Amendment to the Constitution of the United States of America.

The COURT. Q. Were any arrests made at that time?

A. Yes, sir.

Q. Who was arrested?

A. Birdsall.

The COURT. The objection is overruled.

Mr. SMITH. We note an exception.

Mr. BONSALL. Before proceeding any further with the evidence of this witness, I will make a formal offer in evidence of this little gray ledger.

Mr. SMITH. To which we object, if the Court please, on all the grounds set forth in our petition, and on all of the grounds urged yesterday.

The COURT. Objection overruled.

Mr. SMITH. Exception. May all of the objections that were interposed in the various motions filed with your Honor be considered as having

been made at this time to the introduction of this book?

The COURT. Yes.

(Thereupon the book was here introduced in evidence, as the United States Exhibit No. 1.)

Mr. BONSALL. Q. I show you these five papers that are fastened together, and without commenting on them I ask you did you ever see them before?

A. I remember four of them.

Q. Which four do you remember?

A. The water bill, and——

Mr. SMITH. Just a second, I would like to interpose the objection at this time to any interrogation regarding these papers upon all of the grounds I have heretofore urged with respect to the introduction of Exhibit 1 of the Government —I assume that that is the number that has been given to the book, is it?

Mr. BONSALL. Yes, Exhibit 1.

Mr. SMITH. And upon the further ground that there has been no prima facie case of conspiracy established at this time, and that, therefore, any interrogation concerning these papers would be improper.

The COURT. Objection overruled.

Mr. SMITH. Exception.

Mr. BONSALL. Q. I show you this document and without comment I ask you whether you have seen that before.

A. I remember a gas and electric bill. There was a gas and electric bill, and there was a Spring Valley Water bill, and there was a bill from some rattan place, the Coulter rattan place and, if I am not mistaken, a telephone bill.

* * * * * * *

Mr. BONSALL. Q. Did you find a telephone bill at No. 1249 Polk Street, made out to Eddie Marron, for $11.84?

A. Did I find it?

Q. Was it found there?

Mr. SMITH. Now, just a second. We object to that question, if the Court please, as immate-

rial, irrelevant and incompetent, and not binding on the defendant Marron, and as clearly hearsay as to him.

The COURT. Objection overruled.

Mr. SMITH. Exception.

A. These are the papers that were found at 1249 Polk Street. Here is the Spring Valley Water Company bill and here is the telephone bill.

Exception No. 6.

Mr. BONSALL. I now offer in evidence as Exhibit No. 2 a Pacific Gas & Electric bill made out to Eddie Marron, 1249 Polk Street from August 19th to September 19th, 1924, for $11.84.

Mr. SMITH. To which, of course, we object on all the grounds heretofore urged, and upon the further ground that it is nothing but pure hearsay, and that no prima facie case of conspiracy has yet been established.

The COURT. Objection overruled.

Exception No. 7.

Mr. BONSALL. I now offer in evidence a bill of the Spring Valley Water Co. made out to Eddie Marron, 1249 Polk Street, service charge to September 24, 1924, giving the meter reading in the sum of $2.22.

Mr. SMITH. May the same objection be considered as made to that?

The COURT. It may. Objection overruled.

Mr. SMITH. Exception.

Exception No. 8.

Mr. BONSALL. I now offer in evidence bill of Pacific Telephone & Telegraph Company, made out to Eddie Marron, 1249 Polk Street, with a stub attached for toll service, $8.19, and service charge $4.00, being to October 1, 1924, with a list of calls attached.

Mr. SMITH. May the same objection be considered as having been made to the introduction of this particular exhibit?

The COURT. Yes. Objection overruled.

Mr. SMITH. Exception.

Mr. SMITH. And may the same objection be considered as having been made heretofore, and on the further ground that it is hearsay and not binding on the defendant Marron, and that it is immaterial, irrelevant and incompetent?

The COURT. Objection overruled.

Exception No. 9.

Mr. BONSALL. I now offer in evidence a bill of the Coulter Rattan Works dated September 23, 1924, made out to Eddie Marron, for chairs and tables and rugs in the sum of $213.50. I ask that this be given the appropriate exhibit number.

Mr. SMITH. The same objection is interposed to the introduction of this exhibit upon all the grounds heretofore urged to the others.

The COURT. Objection overruled.

Mr. SMITH. Exception.

Mr. BONSALL. Q. Mr. Whittier, I show you this document and ask you if you have ever seen it before?

A. Yes, sir.

Q. Where did you find that?

A. I could not state in what part of the place.

Q. But it was found on the premises?

A. Yes, sir.

Q. On the day in question?

A. Yes, as far as I remember; you know we were there twice.

Q. Yes, I know you were there twice, but to the best of your recollection it was on October 2d, when you found these?

A. Yes, sir.

Exception No. 10.

Mr. BONSALL. I now offer in evidence and request that it be given the appropriate number, a telephone receipt made out to Eddie Marron for telephone No. Pro. 4953, 1249 Polk Street, in the sum of $16.12.

Mr. SMITH. May the same objection be considered as having been made to this?

The COURT. Yes. Objection overruled.

Mr. SMITH. Exception.

Exception No. 11.

Mr. BONSALL. I offer in evidence a receipt of the Spring Valley Water Co. for water at 1249 Polk Street for the term ending August 25, 1924, for $2.80.

Mr. SMITH. The same objection.

The COURT. Objection overruled.

Exception No. 12.

Q. I show you these slips and ask you if you have ever seen them before? I will also show you the envelope they were in.

A. Yes.

Q. When did you first see these papers?

A. Yes, I think those were in that book.

Q. On October 2, 1924?

A. Yes, sir.

Q. At 1249 Polk Street?

A. Yes, sir.

Q. In what book were they?

A. The gray ledger.

Q. You mean United States Exhibit No. 1 on this trial?

A. Yes, sir.

Mr. BONSALL. "Sept. 28, Bill Windler $10. Birdsall $20, Sept. 8. Birdsall $50, September 18, Change $100; Marron $60; Slot Machine $30. Col. Bevin $5, September 21, 1924." These five slips of paper with longhand writing on them are now offered in evidence as Government's Exhibit 8.

Mr. SMITH. We object on all the grounds heretofore urged, and on the ground that they are immaterial, irrelevant and incompetent, and not in the handwriting of the defendant, and, therefore, they are not binding upon him; on the further ground that there has been no prima facie case of conspiracy established.

The COURT. Objection overruled.
Mr. SMITH. Exception.

Exception No. 13.

Mr. BONSALL. Q. I show you this paper and ask you if you ever saw that before?
A. Yes, sir.
Q. Where did you find that?
Mr. BONSALL. Q. When did you find it?
A. October 2, 1924.
Q. Where did you find it?
A. In that gray book.
Q. At 1249 Polk Street, in the City and County of San Francisco, California?
A. Yes, sir.
Mr. BONSALL. I will now offer this statement in evidence. I will read it to the jury at this time.
Mr. SMITH. To which, of course, we object, may it please the Court, upon all of the grounds heretofore urged with respect to the other papers and documents that were seized, upon the ground that it is hearsay as to the defendant Marron; upon the further ground that no prima facie case of conspiracy has been as yet established, and that it is inadmissible as evidence for the reasons heretofore urged.
The COURT. Objection overruled.
Mr. SMITH. Exception.

Cross-Examination.

I don't know if anybody was with me at the time I found the book. I didn't think anything of the book, to tell you the truth. I won't state that I found that book myself or that it was found by someone else and then called to my attention. I think Howard found the book, if I am not mistaken. I am not positive whether Howard found the book, or whether I found it. I think Howard brought it in. I don't know whether I found it and then threw it on the table after asking Birdsall if that was not his name. I think I went to the closet first where this book

was found. Birdsall gave me the key. I told him I wanted the keys. I handed him the search-warrant and let him read it. I either told him I wanted the key or I told him to open the door. I could not tell you whether it was Mr. Howard that got the key for that closet. I would have to look at that book again to be exact. Agent Howard and I went in there to where we found the champagne in the closet in the front room. I know where the book was found, all right, but I don't know whether I found it, or whether Agent Howard found it. I know it was there.

Agent Howard is now in the Leavenworth Penitentiary. I am no longer in the service. I have been out of the service since last October.

Mr. SMITH. Q. Mr. Whittier, I show you a copy of a warrant dated October 1st, issued by Commissioner Hardie, supported by an affidavit made by C. A. Howard, the affidavit being dated October 1, 1924, and I ask you if you have ever seen that instrument before, and, if so, when and where?

A. Yes, I saw it.

Q. When?

A. They handed it out to me, I think, on the 2d of October. I think on the second of October. The agent in charge, Mr. Shurtleff, gave it to me. It was not given to me by the Commissioner himself. Agent Shurtleff gave it to me.

Q. What instructions, if any, did Mr. Shurtleff give you?

Mr. BONSALL. That makes no difference, because it is an absolute mandate of the Court requiring the officer to serve it.

The COURT. Objection sustained.

The WITNESS (continuing). It was by virtue of this warrant that I went to 1249 Polk Street.

Exception No. 15.

Q. While you were at 1249 Polk Street everything you did while there you did under and by virtue of the authority vested in you by that warrant?

Mr. BONSALL. The warrant speaks for itself. The return speaks for itself. I object to the question as immaterial, irrelevant and incompetent.

The COURT. It calls for the conclusion of the witness. The objection is sustained.

Mr. SMITH. Exception.

Exception No. 16.

Q. Mr. Whittier, at the time that you seized these bottles that have been introduced in evidence, did you seize those bottles under your general authority as a prohibition agent, or did you seize the bottles under and by virtue of the special authority vested in you by this warrant and granted to you by the warrant?

Mr. BONSALL. Just a moment. The return on the search-warrant speaks for itself.

The COURT. Objection sustained.

Mr. SMITH. Exception.

Q. Mr. Whittier, at the time you seized Plaintiff's Exhibit No. 1 and the other papers and memoranda that have been introduced in evidence here and marked U. S. Exhibits 2 to 9, were you acting under and by virtue of the authority granted you in this warrant, or were you acting under your general authority as a prohibition agent?

Mr. BONSALL. We object to that as calling for the conclusion of the witness, and as immaterial, irrelevant, and incompetent, and the warrant speaks for itself.

The COURT. Objection sustained.

Mr. SMITH. Exception.

Exception No. 17.

Q. Mr. Whittier, at the time you took the book and the papers that I have heretofore referred to, did you at any time ever make a return to a United States Commissioner showing that you had seized those books and papers under that warrant?

Mr. BONSALL. Again I submit that the return on the search-warrant speaks for itself.

The COURT. Objection sustained.

Mr. SMITH. At this time I ask that the search-warrant I showed the witness, supported by the affidavit of C. A. Howard, and dated October 1, 1924, be introduced in evidence and marked Defendant's Exhibit 'A'.

The COURT. It may be admitted and so marked.

(Thereupon the document was introduced in evidence as U. S. Exhibit 'A'.)

Mr. SMITH. Together with the return that appears on the reverse side thereof.

The COURT. Yes. What is your point—that the return does not show the gray ledger?

Mr. SMITH. Yes, your Honor.

The COURT. All right.

The WITNESS (continuing). The book was found on a shelf, and was not in the same room that the liquors were. The champagne was in a trap down under the floor in a closet."

This testimony was corroborated by various other witnesses for the Government who were present at the time of the search and seizure, but as there is no material variance in their testimony, we will refrain from further references; however in addition thereto a handwriting expert was qualified and testified that the handwriting contained in the ledger was that of petitioner.

THE LAW.

PROPOSITION I.

The law governing seizures and searches and warrants, as expressed in the Fourth Article of the Amendments to the Constitution of the United States is as follows:

> "Section I. The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon reasonable cause supported by oath or affirmation, *and particularly describing the* place to be searched and the persons or *things to be seized.*"

The Fifth Article of Amendments to the Constitution relating to criminal proceedings and condemnation of property reads:

> "Section I. No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger; nor shall any person be subject, for the same offense, to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself;* nor be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation."

No useful purpose can be subserved by an elaborate and extended argument as to the meaning and construction of language so clear and unambiguous. For the purpose of sustaining petitioner's position in the premises, the objections to the seizure of these private documents and their subsequent introduction into evidence may be designated as follows:

> a. The seizure of the said papers, records, books of account and ledgers, was done in contravention of the rights of the defendant under the Fourth Amendment to the Constitution of the United States of America, for the reason that

said papers, records, books of account and ledger were not particularly described in the search-warrant as things to be seized, as required by the said amendment.

b. The said papers, records, books of account and ledger were not instruments or fruits of crime, but, on the contrary, were and are the private memoranda, the private property and the private papers, documents and writings of the defendant.

c. The said purported search-warrant only authorized the said Federal Prohibition Agents to search the said premises for the following described property, to-wit:

> Intoxicating liquor, to-wit, alcohol, brandy, wine, whiskey, rum, gin, beer, ale, porter, sherry wine, port wine, jackass brandy, corn whiskey, wine of pepsin, neuropin, pepsin rennin, fermented grape juice and spirituous, vinous, malt and fermented liquors, liquids and compounds by whatever name called containing one-half of one per centum or more of alcohol and fit for use for beverage purposes, stills, worms, coils, mashes, goosenecks, hydrometers, essences, caramel, coloring materials, boilers.

d. The said Federal Prohibition Agents above referred to, were at the time of executing the warrant, unlawfully upon the premises and were at said time and said place trespassers in taking the said papers, records, books of account and ledger.

e. The said papers, records, books of account and ledger were not upon the person of the defendant, but on the contrary were located in the said premises hereinabove referred to at a time when the defendant was not present.

f. There was neither identification of the said papers, records, books of account and ledger, nor probable cause alleged in the affidavit for the seizure of the papers, records, books of account and ledger, and that their taking was illegal and void.

It may thus be observed that in the presentation of these objections, the rights of the plaintiff in error under the Fourth Amendment to the Constitution of the United States, and under the Fifth Amendment to the said Constitution are being treated as having involved separate and distinct violations for the pertinent reason that while there may be an interrelation between these amendments in so far as the rights of persons are concerned, we assert that a justification under one does not afford an excuse for a violation under the other. Admittedly, in the instant case, neither the ledger nor any of the other private memoranda seized upon that occasion were described in either the warrant or the affidavit, nor were they even remotely referred to.

The evidence showed that the agents had in fact completed the object of their visit when they had reduced to their possession the intoxicating liquors found thereon, and that the seizure of the ledger and the other private documents was made after their authority under the search-warrant had been exhausted.

The significance of the language of the Fourth Amendment "particularly describing the place to be searched and the persons or things to be seized" is of supreme importance in guiding us in our endeavor to demonstrate the violation of the rights of the petitioner under this amendment. We assume that it will be unnecessary to unduly lengthen this brief to demonstrate the wisdom and the policy of the framers of this amendment in the use of words so simple and yet so clear.

Innumerable decisions of our Federal Courts have construed their meaning, and we are not compelled to go far afield in our research for decisions to fortify our position. In fact, the Circuit Court of Appeals for the Ninth Circuit, in the case of *Hagen v. U. S.*, 4 Fed. 2d. 801, had occasion to consider a similar contention under facts which bear a startling similarity to the facts in the instant case, and it is worthy of comment that the *Hagen* case was not referred to by the learned Judge who wrote the opinion in the first *Marron* case.

The facts in the *Hagen* case were briefly these: A prohibition agent testified that he went to the dwelling house of defendant Hagen and, after serving the search-warrant upon him, proceeded to search his house and found therein certain intoxicating liquors. In addition to the seizure of these intoxicating liquors, the agents likewise seized a certain book, together with some papers and cards which were on the person of Hagen and which were subsequently introduced into evidence upon his trial for conspiracy to violate the National Prohibition Act. The question before the Circuit Court concerned the validity of the search-warrant.

The Commissioner issued the warrant, commanding the prohibition officer to enter the premises described in the affidavit and to then and there diligently "investigate and search the same, and into and concerning said crime, and to search the person of said Ed Hagen and employees, and from him or her, or from said premises, seize any and all of the said property so used in or about the commission of said

crime, and then and there take the same into possession, and a true report make."

The officer returned the warrant, stating that he had found certain described quantities of whiskey and beer and various letters, books, papers, cards and accounts in possession of the various defendants. It appears, therefore, that both the affidavit and the search-warrant were broader in the *Hagen* case then they were in the *Marron* case, for the reason that in the *Hagen* case they specifically referred to property used as the means of committing a crime, and the officer who made a return on the search-warrant likewise described the seizure of said private books and memoranda which was not done by the officer who made the return upon the warrant in the *Marron* case. In reversing the judgment of conviction for the crime of conspiracy against Hagen, the Circuit Court of Appeals for the Ninth Circuit condemned the search and seizure in the following language:

> "Nor was there any statement that in the house there were documents or books or memoranda tending to show unlawful sale of intoxicating liquor, *or that Hagen had in his personal possession any writings or other evidence connecting him with a violation of the prohibition law, nor was there any attempt to describe the books or documents or papers to be seized from Hagen, or anybody else.*"

That Hagen's rights under the Fifth Amendment to the Constitution were violated by the reception into evidence of these private memoranda and books of account, was likewise affirmed in the decision with this language:

> "The legal effect of such a search and seizure of papers was to force the person seized to become the unwilling source of evidence against himself, and put him in a position where he can invoke that protection afforded him by the Fourth and Fifth Amendments to the Constitution and by the Acts of Congress."

We again call to the attention of this Honorable Court the undisputed fact that the search-warrant in the instant case described no article or thing other than intoxicating liquors and paraphernalia used in their manufacture.

As stated above, the learned Judge who wrote the original Marron opinion not only failed to recognize the doctrine in the *Hagen* case, but neglected to even comment upon the principle involved therein. He relied solely upon the case of *U. S. v. Sayers,* 2 Fed. 2d 146, Ninth Circuit, which case we assert is unlike the present case in point of fact as well as in point of law.

It should be noted in passing that the defendant in the *Sayers* case was convicted of the unlawful possession and sale of intoxicating liquors, while in the instant case the petitioner was convicted of a felony, to-wit: criminal conspiracy.

The portion of the opinion in the *Sayers* case material to the present discussion is as follows:

> "A lawfully arrested person may be searched for instruments, fruits and evidence of the crime; and if taken in commission of the crime in a building, the latter may be likewise searched to the extent that the offender's control and activities likely extended.

> This is the law since the 4th Amendment, even as it was law before it, is reasonable, and is not within the Amendment's ban upon unreasonable searches and seizures. * * *
>
> In any such search not only may the instruments and fruits of crime be seized, but mere evidentiary articles including papers incidentally discovered may be likewise seized. This was expressly held in Adam's case, supra, and has not been departed from in any qualification of said case. 'There is no special sanctity in papers as distinguished from other forms of property, to render them immune from search and seizure, *if only they fall within the scope of the principles of cases in which other property may be seized.' Gould's case, supra.* Of a person arrested every garment and pocket may be searched, and the same principle authorizes that of a building, generally every room may be searched."

We are in accord with the academic principle that a person accused of crime may be searched, and instruments, fruits and evidences of crime may be seized from his person and from the premises in which the alleged crime has been committed, nor is a citation of authorities necessary to fortify the legality of seizures of the many evidences of crimes, of which the seizure of burglar tools and other indicia of crime offer typical examples.

But all of these cases are bottomed upon the assumption that the fruits and tools and other evidences of crimes have on first blush such a real and substantial relation to the crime or offense in the detection and apprehension of which the instrument was seized, that they form an integral part and parcel of the crime.

There is, however, such a real and substantial distinction between evidences of crime in the nature of burglar tools and articles of that character and private memoranda and documents of the character considered in the instant case, that the mere statement of their nature must, in and of itself, be sufficient to demonstrate the difference.

The proposition that is now being contended for before this Court, is by no means a novel one, and as will be hereafter shown, various District and Circuit Courts throughout the country have had occasion to consider it and have uniformly held in support of petitioner's position.

We invite attention to the case of the *United States v. Mills,* 185 Fed. 318. This proceeding came before the Circuit Court of New York on the petition for instructions to be directed to the United States Marshal, of that District, and the District Attorney, to return to defendants certain books and papers which had been seized pursuant to a bench warrant.

The defendants were co-partners and were indicted for conspiracy to defraud the United States as a result of false and fraudulent invoices alleged to have been made by them on foreign merchandise. A bench warrant for the arrest of the defendants was issued, and the Marshal, in addition to arresting the defendants, searched for, found, seized and removed from the premises of the defendants a large number of books and papers, which were subsequently delivered to the District Attorney.

The bench-warrant referred to the indictment commanded the marshal to arrest the three defendants,

describing particularly the persons to be seized, but not particularly describing the place to be searched and the *things to be seized.*

The Court said (page 319):

> "When executing the bench-warrant, the marshal seized not only the documents concerned in the particular importation of December 3, 1906, but also all the books and papers of the firm covering their business above referred to. Having examined these, the district attorney states that they disclose evidence of further offenses, as to which he is about to advise the grand jury that 'further indictments, charging additional offenses than those contained in the indictment already found, could be found'.
>
> It may be highly desirable, from the point of view of a prosecuting officer, that some such comprehensive seizure of a person's books and papers should be had; the trial of an offense thus charged may be thus facilitated, and it may be easier to discover that the same person has been guilty of other similar offenses. It may promote the ends of justice that the right to search and seize should be strengthened rather than impaired. It may be that there is 'much less danger of doing injustice to the individual than there is of overlooking the obligations of those in authority to organized society'. Opinions will differ as to which is the wiser public policy. But, whatever may be one's individual opinion, it is difficult to see how a subordinate federal court can sustain such a wholesale seizure as we have here, so long as the decision of the Supreme Court in Boyd v. U. S., 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, remains unreversed and unqualified. It certainly has never been reversed, and the subsequent decisions of the Supreme Court in which it has been referred to do not indicate that the practice followed in this case should be approved.

> In Adams v. New York, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575, the court is careful to point out that the only question before it was as to the introduction in testimony of papers found on defendant's premises at the time of his arrest."

A similar question was presented to the Circuit Court of Appeals of the Second Circuit, in the case of *Fitter et al. v. United States,* 258 Fed. 567. The facts were as follows:

The defendant claimed that he was forced to furnish incriminating evidence against himself, and that he was convicted upon evidence secured in an unlawful and illegal manner and in violation of his constitutional rights. * * * It appears that, acting under instructions given by the United States Attorney or his assistant, an officer belonging to the United States Secret Service came to the defendant's place of business in the absence of Fitter, and demanded that Fitter's wife allow him to examine the ledger, delivery slips, receipts, and check books. This demand was complied with, and certain slips and papers were taken away. An hour later an automobile drove up, and two men entered the store, one of whom wore a naval uniform, the other one said he was a secret service agent. They entered the back office and called for "Ledger, ledger, contract ledger". Mrs. Fitter at that time was working on the ledger. The man in uniform grabbed the ledger and carried it out of the store. And as the two left, one of the men said he was going to bring the ledger back after comparing it with the delivery slips. Mrs. Fitter did not see

the delivery slips, papers and contract ledger again, however, until she saw them in the office of the United States Attorney on November 27, 1917.

On November 14, 1917, four days after the illegal seizure of the defendant's ledger and papers, the United States Attorney for the Eastern District of New York was requested to return the ledger, and an offer was made to preserve the ledger in its then condition. No attention was paid to this request, and the ledger was not returned.

Thereafter, and before the trial of this action, a motion was made for the return of the ledger, papers, and slips which has been unlawfully seized, and by direction of the Court the ledger and some of the papers were turned over by the United States Attorney to counsel for the defendant.

Neither of the men who examined the defendant's books and papers had a search-warrant authorizing them to examine or to seize either the books or the papers. The testimony of the officers is that no forcible seizure was made, but that a request was made which was acceded to by Fitter's wife. What was done was undoubtedly an arbitrary and unlawful violation of Fitter's constitutional rights. The Fourth Amendment to the Constitution provides:

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment, provides, *inter alia,* that no person—

> "shall be compelled in any criminal case to be a witness against himself".

In the *Petition of Barber,* 281 Fed. 550, the facts were practically identical with the facts in the instant case, and it is difficult to preceive how a distinction may be drawn between the principles controlling this case and the principles for which we are contending in the present case.

The *Barber* case arose as a result of a petition filed, seeking the return of certain malt, hops, rye, sugar, bottles, and other paraphernalia intimately connected with the manufacture and disposition of intoxicating liquor, *together with certain books, letter files, ledgers, papers, records, advertising matter, and stationery used in the conduct of the business of petitioner, namely, selling hops, malt, materials, supplies and other merchandise which he alleged were unlawfully seized and taken from his place of business in the City of Detroit.* The affidavit upon which the search-warrant was issued is quoted at length in the opinion, as is likewise the search-warrant referred to, and we direct the attention of the Court to that portion of the search-warrant material to our discussion.

> "Now, therefore, in pursuance with the provision of the law and particularly the National Prohibition Act, relating to the prohibition of the sale and possession of malt, hops, capping machines, caps, bottles and other utensils and property designed for the manufacture of liquor intended for use in violating the National Prohibition Act,

and upon probable cause shown, you are hereby authorized to enter the said premises in the day with the necessary and proper assistance, and thoroughly search the premises aforesaid for all subjects and evidence of fraud against the government of the United States and for violation of the National Prohibition Act, including the property above mentioned, to the end that such violations may be discovered and restrained, and that all offenders and property forfeited may be dealt with according to law, and hereof made due return without delay.

"Witness the hand and the official seal of the said commissioner, at Detroit, Michigan, in said district, this 3rd day of March, A. D. 1922.

(signed) J. Stanley Hurd,
United States Commissioner, Eastern District of Michigan."

Various objections were raised by Barber as to the validity of the search-warrant, among one of which was the following:

"That said search warrant did not expressly command the seizure of the property found by the search, but left indefinite and discretionary the property to be seized by the search."

The Court's disposition of various objections is not germane to this discussion, excepting the conclusion arrived at, based upon the objection hereinbefore set forth.

" * * * It is not claimed by petitioner that any person was misled or prejudiced by such description, and I cannot doubt that the objection based upon the alleged indefiniteness of description of such property or supposed variance between the property so described and the property seized must be overruled, *except as to the books, files, ledgers, records, advertising matter, stationery, and papers seized, but not described nor*

mentioned in the affidavit or in the search warrant.

It is plain that, as the latter were not described nor even mentioned in the affidavit or search warrant, their seizure thereunder was unauthorized for that reason, even if otherwise subject to seizure, and, if actually seized and still retained, they must be forthwith returned to petitioner. United States v. Mills, 185 Fed. 318; Fitter v. United States (C. C. A. 2), 258 Fed. 567, 169 C. C. A. 507."

In *United States v. Hills,* 263 Fed. 812, the proposition is so succinctly stated that we take the liberty of quoting the decision in full:

"It appearing, upon inspection, that the description in the search warrant contained of the things to be seized thereunder did not embrace any papers or documents of the defendant, and that therefore it was not broad enough to include the letter from Alonzo Taylor to the defendant, dated April 14, 1919, the defendant was on his petition heretofore filed herein, entitled to a return of the said letter, and an order may be so taken. Weeks v. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177; U. S. v. Friedberg (D. C.), 233 Fed. 313; State v. Slamon, 73 Vt. 212, 50 Atl. 1097, 87 Am. St. Rep. 711.

And it further appearing that the said letter was improperly admitted in evidence against the defendant's exception, and that the same was prejudicial to the defendant, the verdict will be set aside, and a new trial of this cause granted."

See also:

Amos v. U. S., 255 U. S. 313, 41 Sup. Ct. 266, 65 L. Ed. 654;

U. S. v. Porazzo Bros., 272 Fed. 276.

PROPOSITION II.

Kirvin v. United States, 5 Fed. 2d 282, should be followed as an authority on the facts in the instant case rather than the first decision in *Marron v. United States,* 8 Fed. 2d. 251. Judge McCamant, who wrote the opinion in the *Marron* case, disposed of the law as enunciated in the *Kirvin* case, in the following language at page 256 of the report:

> "The defendants rely on Kirvin v. U. S. (C. C. A. 2), 5 Fed. 2d 282. It may be conceded that this decision cannot be reconciled with the views above expressed. We have great respect for the Court which handed down this opinion, but we prefer to follow our own precedents. We still think that Sayers v. U. S., 2 Fed. 2d 146, was correctly decided."

The *Kirvin* case came before the Circuit Court of the 2nd Circuit under the following circumstances: An application had been made by Harold A. Kirvin to quash, vacate and set aside a search-warrant affecting the premises located at No. 191 Front Street, Borough of Manhattan, City of New York, and for a return of records, papers and documents seized thereunder. The original application was made before the United States Commissioner who sustained the application. Thereupon the District Court of New York reviewed the action of the United States Commissioner and duly gave his order reversing the action of the Commissioner. Thereafter the petitioner appealed to the United States Circuit Court of Appeals, which Court in turn reversed the action of the United States District Court. The facts briefly are these: A search-warrant was issued on the 18th day of December, 1923, by one

of the United States Commissioners for the Southern District of New York. The affidavit upon which the search-warrant was issued alleged an unlawful sale of intoxicating liquor upon these premises and concluded with the averment that it was necessary to procure a search-warrant to search the said premises and to seize all intoxicating liquor found therein, *together with any books, papers, records or documents pertaining to the sale, possession or transportation of intoxicating liquors.*

A search-warrant was thereupon issued on the affidavit above referred to and after describing the premises to be searched directed the officers to search diligently "for said liquors and records" and directed the making of a return if any seizure was made under said warrant.

A seizure was made and resulted in obtaining a quantity of liquor and also a large list of books, papers and records consisting of many telegrams, invoices, receipts and various letters.

It is worthy of comment at this time to state that not only the affidavit in this case but the search-warrant itself directed the officers to seize not only the liquor in question, but contained likewise an omnibus direction to seize records, papers and documents; it would appear therefore that the search-warrant was to that extent more comprehensive than the search-warrant in the instant case, for here the warrant is silent as to things to be seized other than intoxicating liquors and paraphernalia used in their manufacture. The first contention made in the *Kirvin* case, and the

first contention made in the instant case, that as to the records seized, the search-warrant was issued without probable cause, is answered by that learned Court in the following language:

> "We need not consider the sufficiency of the allegations as to the liquor seized for that seizure is not now questioned. The affidavit in no place refers to any record being used in connection with the sale of alcohol, and there is no description of the records, papers, or memoranda of any kind. The only reference to it is in the last few lines in the affidavit, which says, 'and to seize all intoxicating liquors found therein, together with any papers, books, records or documents pertaining to the sale, possession or transportation of intoxicating liquors'. This allegation does not warrant the seizure of papers nor could any testimony before the commissioner supply what is here missing."

One of the arguments of the Government in that case, and the principal argument of the Government in this case, which contention the learned judge who wrote the opinion for this Court in the *Marron* case, evidently adopted, was that the records, papers and documents so seized were means or instruments or fruits of crime.

We can do no better than to quote the language of the *Kirvin* case in answer to this contention:

> "We cannot agree with the government's argument that the records were means or an instrument of crime. They might be some evidence of crime. Gouled v. U. S., 225 U. S. 310, 41 S. Ct. 261, 65 L. Ed. 647. The legality of the search-warrant may become the very foundation upon which the successful prosecution of a guilty defendant depends. The constitutional rights guar-

anteed by the Fourth Amendment of the Constitution must be equally enforced in favor of the guilty and innocent. Unless sufficient facts are shown under oath to support the finding of a probable cause, the right of a person to be secure from unreasonable searches and seizures must not be violated. Silverthorne Co. v. U. S., 251 U. S. 385, 40 S. Ct. 182, 64 L. Ed. 319; Weeks v. U. S., 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177; Boyd v. U. S., 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746. A search-warrant must be as broad, and no broader, than justifying the basis of fact. It is not every kind of property that may be seized under a search-warrant. It is intended that the warrant be issued with the privilege to seize such property as was used as the means of committing a felony. All papers and documents which afford evidence that a felony has been committed, but which were not the means of committing it, are immune from seizure. Veeder v. U. S., 252 Fed. 414, 164 C. C. A. 338."

The next contention of the Government in the *Kirvin* case was that the officers who were executing the warrant were lawfully on the premises, and, being there, they might seize the papers in question. That contention is answered in the following language:

> "But as to the records they had no search-warrant. They were as trespassers in taking these documents."

The next contention was that the plaintiff in error, Kirvin, was arrested at the time the papers were seized and therefore the seizure was lawful.

> "But the papers were not on his person, and the distinction has been recognized between what one carries about on his person and what one

keeps in his house. A search-warrant cannot be extended beyond the privileges granted in its issuance. Nothing further may be included. There was neither identification of the records, nor probable cause alleged in the affidavits for the seizure of the records, and their taking was illegal, and therefore void."

We are aware that as the result of the complex structure of the various Federal Courts of the United States, numerous conflicts in the decisions of the various Courts are found, but we assert that a research of the various decisions will fail to disclose a more startling conflict in authority upon a question that involves rights of such a fundamental character.

It is impossible to distinguish the *Marron* case and the *Kirvin* case for the purpose of reconciling either the law or the facts.

PROPOSITION III.

Marron v. United States, 8 Fed. 2d 251, is in direct conflict with the decision of *Gouled v. U. S.,* 255 U. S. 310; 41 S. Ct. 261; 65 L. Ed. 647 and with *U. S. v. Katz,* 70 L. Ed. 554; U. S. S. Ct. Advance Opinions, June 15, 1926, and should, therefore, be expressly overruled.

It has been suggested herein that both the Circuit Courts of Appeal of the Ninth and the Second Circuits have relied upon the decision of this Court in *Gouled v. U. S.,* 255 U. S. 310; 41 S. Ct. 261; 65 L. Ed. 647, and have placed two entirely opposed interpretations upon it.

It would appear from an examination of the *Gouled* case that the language contained therein is susceptible of but one construction and interpretation, and that as expressed in the *Kirvin* decision.

An examination of the case will disclose that six questions were certified to the Court by the United States Circuit Court of Appeals for the Second Circuit.

Briefly stated, the facts were that the plaintiff in error Gouled, one Vaughan and an attorney at law were charged with being parties to a conspiracy to defraud the United States in violation of Section 37 of the Federal Criminal Code, and in the second count in the indictment were charged with having used the mails to promote a scheme to defraud the United States in violation of Section 215 of the Code. Gouled was convicted. An appeal was prosecuted, and the matter came before the United States Supreme Court for a certification of six questions.

The first two questions concerned the admission in evidence of a paper surreptitiously taken from the office of Gouled by officers of the Intelligence Department of the Army. With this feature of the case, namely, the surreptitious and furtive taking of a man's papers, we have no concern.

We repeat that we are not concerned with that portion of the opinion disposing of these questions. The remaining four questions, however, related to papers taken from the defendant's office *under two valid search-warrants*, and it is with these questions that we are vitally concerned.

The *Gouled* case, therefore, may be definitely segregated and construed as establishing two propositions, namely (Firstly), Surreptitious and furtive taking of a man's private documents; and (Secondly) the seizing of them *under a valid search-warrant.*

The private documents of Gouled, seized under the search-warrant, consisted of an unexecuted form of contract between him and one Lavinsky; a written contract executed by the defendant and one Steinthal, and a third a bill for disbursements and professional services rendered by an attorney at law for and on behalf of Gouled. These various documents were alleged in the petition upon which the search-warrant was issued, to have been used in the commission of a felony, to-wit, the bribery of an officer of the United States; it was further alleged in another affidavit that Gouled had at his office certain letters, papers and documents and writings which were related to and had been used in the commission of a felony, to-wit, conspiracy to defraud the United States, upon which charge the defendant Gouled was before the Court.

Subsequent to the seizure of these papers, an indictment was returned and prior to the trial a motion was made on behalf of Gouled for the return of the papers seized under the search-warrant, which motion was denied.

A duplicate original of the Steinthal contract and the original Lavinsky contract, together with the bill for attorney's fees, were offered and admitted into evidence over the constitutional objections of Gouled, to-

wit, the violation of his rights under the Fourth and Fifth Amendments.

Mr. Justice Clark, in his conclusion, made plain the distinction between a search for stolen and forfeited property, counterfeit coins, burglars' tools, weapons, implements of gambling and other things of like character. Unquestionably these things were enumerated expressly in the opinion to emphasize the distinction between them and the private books, writings and documents of a citizen, and he likewise was careful to preserve the rights of seizure under search-warrants of private papers, but he added:

> "they may be resorted to only when the primary right of such search and seizure may be found in the interest which the public or complainant may have in the property to be seized, but not the right to the possession of it, or where the valid exercise of the police power renders possession of the property by the accused unlawful, and provides that it may be taken. (Boyd v. United States.)

> "There is no special sanctity in papers as distinguished from other property to render them immune from search and seizure *if only they fall within the scope of the purpose of the cases in which other property may be seized and if they be adequately described in the affidavit and warrant.*"

The third question certified for consideration is, in the language of the opinion, as follows:

> "Are papers of no pecuniary value, but possessing evidential value against persons presently suspected and subsequently indicted under Secs. 37 and 215 of the United States Criminal Code when taken under search warrants issued pur-

suant to the Act of June 15, 1917, from the house or office of the person suspected,—seized and taken in violation of the 4th Amendment?"

"That the papers involved are of no pecuniary value is of no significance. Many papers, having no pecuniary value to others, are of the greatest possible value to the owners, and are property of a most important character. (Boyd Case, 116 U. S. 627, 628, 29 L. Ed. 749, 750, 6 Sup. Ct. Rep. 524); and since those here involved possessed 'evidential value' against the defendant, we must assume that they were relevant to the issue.

"Restraining the questions to the papers described, and first, as to the unexecuted form of contract with Lavinsky, a stranger to the indictment: While the contents of this paper are not given, it is impossible to see how the government could have such an interest in such a paper that, under the principles of law stated, it would have the right to take it into its possession to prevent injury to the public from its use. The government could desire its possession only to use it as evidence against the defendant, and to search for and seize it for such purpose was unlawful.

"Likewise the public could be interested in the bill of the attorney for legal services only to the extent that it might be used as evidence, and the seizure of this also was unlawful.

"As to the contract with Steinthal, also a stranger, to the indictment: It is not difficult, as we have said, to imagine how an executed written contract might be an important agency or instrumentality, in the bribing of a public servant, and in perpetrating frauds upon the government, so that it would have a legitimate and important interest in seizing such a paper in order to prevent further frauds upon the government, but the facts necessary to give this contract such a character do not appear in the certificate. On the contrary, this third question recites that the

papers are all of no pecuniary, but are of evidential, value, and in the sixth question it is recited that they are 'of evidential value only', so that it is impossible to say, on the record before us, that the government had any interest in it other than as evidence against the accused; and, therefore, as to all three papers, the answer to the question must be in the affirmative."

The fourth question reads:

"If such papers, so taken, are admitted in evidence against the person from whose house or office they were taken, such person being then on trial for the crime for which he was accused in the affidavit for warrant,—is such admission in evidence a violation of the Fifth Amendment?"

The same papers being involved, the answer to this question must be in the affirmative; for, they having been seized in an unconstitutional search, to permit them to be used in evidence would be, in effect, as ruled in the *Boyd* case to compel the defendant to become a witness against himself.

The next question in order for consideration related to the violation of the defendant's rights under the Fifth Amendment by the subsequent admission of the seized documents into evidence, and in the language of the opinion,—

The fifth question reads:

"If, in the affidavit for search warrant under Act of June 15, 1917, the party whose premises are to be searched be charged with one crime, and property be taken under the warrant issued thereon, can such property so seized be introduced in evidence against said party when on trial for a different offense?"

It has never been required that a criminal prosecution should be pending against a person in order to justify search for and seizure of his property under a proper warrant, if a case of crime having been committed and of probable cause is made out, sufficient to satisfy the law and the officer having authority to issue it, and we see no reason why property seized under a valid search-warrant, when thus lawfully obtained by the Government, may not be used in the prosecution of a suspected person for a crime other than that which may have been described in the affidavit as having been committed by him. The question assumes that the property seized was obtained on a search-warrant sufficient in form to satisfy the law; and if the papers to which the question refers had been of a character to be thus obtained, lawfully, it would have been competent to use them to prove any crime against the accused as to which they constituted relevant evidence.

The sixth question inquired as to the duty of the trial Court to inquire into the origin of and the method adopted in procuring the papers when the documents are offered in evidence against the party indicted. The Court answered the question as follows:

> "The papers being of 'evidential value only' and having been unlawfully seized, this question really is, whether, it having been decided on a motion before trial that they should not be returned to the defendant, the trial court, when objection was made to their use on the trial, was bound to again inquire as to the unconstitutional origin of the possession of them. It is plain that the trial court acted upon the rule, widely adopted, that courts in criminal trials will not pause to deter-

mine how the possession of evidence tendered has been obtained. While this is a rule of great practical importance, yet, after all, it is only a rule of procedure, and therefore it is not to be applied as a hard-and-fast formula to every case, regardless of its special circumstances. We think, rather, that it is a rule to be used to secure the ends of justice under the circumstances presented by each case; and where, in the progress of a trial, it becomes probable that there has been an unconstitutional seizure of papers, it is the duty of the trial court to entertain an objection to their admission, or a motion for their exclusion, and to consider and decide the question as then presented even where a motion to return the papers may have been denied before trial. A rule of practice must not be allowed for any technical reason to prevail over a constitutional right."

This Court has had occasion to disapprove of a portion of the *Marron* opinion by its recent decision in the case of *U. S. v. Katz,* 70 L. Ed. 554.

The learned judge who wrote the opinion in the *Marron* case, as one of the grounds upon which he fortified his conclusion as to the legality of this seizure, relied upon the provisions in Section 10 of Title 2 of the National Prohibition Act. (41 St. 312, Sec. 8351i of Barnes Code 1924 Supp.; U. S. Comp. St. par. 10138½e.) See page 255.

That section provides:

"No person shall manufacture, purchase for sale, sell or transport any liquor without making at the time a permanent record thereof, showing in detail the amount and kind of liquor manufactured, purchased, sold or transported, together with the names and addresses of the persons to whom sold, in case of sale, and the consignor and

consignee in case of transportation, and the time and place of such manufacture, sale or transportation. The Commissioner may prescribe the form of such record, which shall at all times be open to inspection, as in the act provided."

Section 34 of the same title, Comp. St. Ann. Supp., par. 10138½u, provides that the records required by Section 10, aforesaid "shall be subject to inspection at any reasonable time by the Commissioner, or any of his agents, or by any public prosecutor, or by any person designated by him."

The opinion of the first *Marron* case continues as follows on page 255:

"The gray ledger does not contain all of the information called for by section 10 of title 2 of the Prohibition Act, but it contains a more or less complete record of the liquor purchased, a record of the sales from day to day and in some cases the names of the purchasers. Such a book is not like the private papers of a citizen. It is subject to inspection by a number of persons, and the statute requires it to be kept as a permanent record. It is true that the gray ledger contains other matter in addition to that which the statute requires to be kept, but a party who records his affairs in a book subject to inspection cannot complain of the consequent invasion of his privacy."

In the *Katz* case it was definitely held that the provisions of these sections respecting the keeping of records of the sales, etc. of intoxicating liquor was a requirement upon persons permitted to make the sales and not upon persons attempting to make unlawful sales. After a review of various Federal cases concerning the interpretation to be given this section,

Mr. Justice Stone concludes the opinion with this language:

> "We think the reasoning of these cases applicable here and that the words 'nor person' in paragraph 10 refer to persons *authorized under other provisions of the act to carry on traffic in alcoholic liquors.*"

PROPOSITION IV.

The Court erroneously permitted the witness Neilsen to give evidence, which if believed, disclosed a separate and distinct conspiracy in no wise related to the conspiracy as alleged in the indictment, or the scope of the conspiracy as gathered from the testimony, and in that connection gave to the jury instructions which contained gravely erroneous and prejudicial errors of law.

This particular point is covered by specifications of error Nos. 4 and 5. The error complained of relates to the action of the trial Court in permitting the witness Neilsen to testify to certain transactions had with this petitioner and in charging the jury in the language hereinafter set forth. The defendants Walter Grand, Charles Mahoney and George Hawkins, George Birdsall and Joseph Marron are charged in the indictment with the crime of conspiracy to violate the National Prohibition Act in various respects in maintaining a common nuisance and in possessing liquor at 1249 Polk Street in the City of San Francisco. The defendants Gorham and Kissane are accused by the indictment as co-conspirators in that they in their capacity as Police Officers received money from the

defendants above mentioned for the purpose of securing these defendants against interference in the illegal conduct of their business.

The purposes of the conspiracy are stated in thirty-four sub-paragraphs and it is further alleged in the indictment that in aid of the conspiracy and for the purpose of effecting and accomplishing the objects thereof eleven particular overt acts were committed. The indictment is lengthy and covers forty-seven pages of printed transcript. (Trans. pages 3-50.)

Upon the trial of the action many witnesses testified as to the illegal sale of intoxicating liquor upon the premises which evidence was elicited for a two-fold purpose namely the establishment of sale of intoxicating liquor on the premises and for the establishment of the fact that the said premises were a common nuisance as defined by the provisions of the National Prohibition Act.

The witness Neilsen did not testify upon the trial of the first action in January, 1924, nor was he indicted by the Grand Jury as a co-conspirator.

Upon the trial of the present action he testified as follows:

That he was convicted of a felony and at the time of this trial was serving a sentence in the county jail at San Rafael; that he knew the petitioner Marron and visited him at 1249 Polk Street in 1924.

> "Mr. WISEMAN. We object to that as immaterial, irrelevant and incompetent and on the further ground that any business that he might have had at 1249 Polk Street is not binding on

the defendant unless there is a prima facie case of conspiracy established; and on the further ground that it is an attempt to show or prove an overt act not alleged to be in furtherance of the conspiracy—not alleged in the indictment.

The COURT. Objection overruled. It is preliminary, we don't know what they are attempting to prove yet.

Mr. WISEMAN. Exception."

That at the time of his first visit at these premises he saw the defendant Marron and the purpose of his visit was to get an order from Marron to go out to the "Malahat", a rum ship.

"Q. Did you go out to the 'Malahat' with that order?

Mr. WISEMAN. Just a moment, we make the same objection, your Honor, and upon the further ground that it is an attempt to show or prove an overt act not alleged to be in furtherance of the conspiracy and directly on all fours with the Terry case.

The COURT. Objection overruled."

Mr. WISEMAN. Exception."

That he got this order from Marron, visited the "Malahat", returned with about one hundred cases of Scotch whiskey and landed it around Mission Rock in the City of San Francisco. (Trans. pages 232-238.) He further testified that he did not know who was present at the time he brought the liquor ashore.

"Q. Who were there at the time this liquor was landed?

Mr. WISEMAN. If your Honor please, as far as the incident of the 'Malahat', and the liquor, and the landing of the liquor, we renew the objection on the ground it is immaterial, irrelevant and incompetent, and, further, it is an attempt to show

an overt act not alleged in the indictment, either measured by the indictment, itself or by the testimony as elicited during the trial.

The COURT. Objection overruled. As I understand it, every overt act does not have to be alleged.

Mr. WISEMAN. But the conspiracy must be measured by the allegations of the indictment, or the testimony elicited from the witness on the trial. The same situation developed in the Terry case.

The COURT. Objection overruled.

Mr. WISEMAN. Exception."

That he was paid for the load of liquor at 1249 Polk Street by the defendant Marron and received the sum of three hundred dollars ($300.00).

On March 17, 1924, he received another order from Marron to go to the "Prince Albert", a rum ship, and his testimony from this point is set forth at length:

"WITNESS (continuing). I did not land that liquor because I got swamped during the night. I went to Marron and told him how it happened. I went to see him at 1249 Polk Street in this city and county and state. I went to see him there after it happened, about a day or two after I came ashore. I just told him I lost them, and he told me it was too bad that I had to lose my boat. I did lose my boat at that time. I took off 150 cases from the 'Prince Albert'.

Q. Did you get that order filled at the 'Prince Albert'?

Mr. WISEMAN. We make the same objection to the 'Prince Albert' incident as we made to the 'Malahat' incident, and to the incident of the landing of the liquor.

The COURT. Very well; objection overruled.

Mr. WISEMAN. Exception.

A. Yes, sir.

There was some champagne and some Scotch. I was to get the same price for that, $3.00 a case. He did not make any other reference to the loss of that liquor, the defendant Marron. I think I made one more trip later on for the defendant, after that. I don't know exactly, it was between that time and probably two or three months later. I don't know. I am not sure.

Exception No. 82.

Q. What boat did you make that trip with?

Mr. WISEMAN. Just a moment. We renew our objection to this incident, the same as to the other incidents, upon the same ground.

The COURT. Very well; objection overruled.

Mr. WISEMAN. Exception.

WITNESS (continuing). I had an order at that time furnished by the defendant, Marron. I was to go to the 'Malahat', if I remember right. I did go to the 'Malahat'; I did present the order. I went out there on the boat that the Government seized. The name of the boat was the 'L. C. L.' They gave me the liquor on that order, and I loaded it on the 'L. C. L.' I brought the liquor ashore. I think it was 150 cases; I think it was landed on pier 20, between pier 20, or 22, in this city. It was around midnight that I brought it ashore. I saw the defendant, Marron, at that time. I believe I did. No, I don't think I saw him when I first came ashore at that time. I don't think then, but he came right afterwards. I waited around a while and then he made his appearance. It took me about an hour and a half to get the liquor up on the wharf. I saw a truck on the shore; there was a truck standing there. I got paid for carting that liquor, at 1249 Polk Street in this city. I saw the defendant there. Eddie Marron paid me for this lot of liquor, Eddie Marron himself. It was about a day or two after the liquor was landed on shore before I went to get my money. He paid me $3.00 a case. All told that would be $450.00. He paid me in

currency; he usually paid me in one of the front rooms at 1249 Polk Street." (Trans. pages 239-241.)

This testimony was objected to by counsel upon the ground that it was immaterial, incompetent and irrelevant, that it was an attempt to prove overt acts being neither charged nor alleged in the indictment and that the acts themselves were not shown either by the indictment or by the testimony to have been done for the purpose of effecting the object or purpose of the conspiracy for which the defendant Marron was then standing trial. The Court overruled the objections made to which rulings the defendant Marron duly excepted. (Trans. pages 232-241.) At the conclusion of the testimony the petitioner Marron moved to strike out all of the evidence of the witness Neilsen on the same grounds that were urged in the objections to the introduction of the evidence.

"Exception No. 83.

Mr. WISEMAN. For the purpose of the record, I make a motion at this time to strike out all of the testimony of the witness Neilsen in so far as these incidents concerning the landing of liquor from these various ships, together with the landing at the wharves, and its transportation, on the ground that it is immaterial, irrelevant and incompetent, they are not charged or alleged in the indictment on file herein on which the defendant Marron, is now standing trial, they are not shown by either the indictment, or by the testimony, to have been done in furtherance of or for the purpose of effecting the object or purpose of the conspiracy.

The COURT. Motion denied.

Mr. WISEMAN. Exception."

This motion was denied by the Court and to which ruling the petitioner Marron then and there duly excepted. (Trans. page 247.)

And at the conclusion of the charge of the Court to the jury defendant duly excepted to the language of the Court concerning his activities with the witness Neilsen.

The particular language employed by the Court in this connection is covered by Assignments of Error Nos. 95-100 inclusive and is as follows:

> "In order to sustain the indictment, it is necessary that the government prove one or more of the following overt acts charged in the indictment.
>
> "That on November 17, 1923, at 1249 Polk Street, former Police Officer Patrick Kissane received the sum of $5 from George Birdsall, alias George Howard, for the express purpose of furthering the said conspiracy, and with the intention so to do."
>
> "That on March 31, 1924, former Police Sargeant Joseph Gorham received at 1249 Polk Street from George Birdsall, alias George Howard, the sum of $90 for the purpose of furthering such conspiracy, and with the intention so to do."
>
> "That in November, 1923, George Birdsall, alias George Howard, sold intoxicating liquor at 1249 Polk Street, in furtherance of said conspiracy, and with the intention so to do."
>
> "That on May 15, 1924, Joseph E. Marron, alias Eddie Marron, maintained a nuisance at 1249 Polk Street by keeping for sale on the premises at 1249 Polk Street intoxicating liquor in violation of the National Prohibition Act, in pursuance of said conspiracy, and with the intention to further the object of the same."
>
> "That on May 15, 1924, George Birdsall, alias George Howard, maintained a common nuisance

at 1249 Polk Street by selling liquor at 1249 Polk Street in violation of the National Prohibition Act, in pursuance of said conspiracy, and with the intention to further the object of the same. However if the Government has proven any one of these overt acts alleged in the indictment they may prove any other overt acts by the conspirators named in the indictment or with unnamed conspirators in furtherance of the object of the conspiracy."

"In this regard, I charge you that if the Government has proven any one of the five overt acts mentioned, you are entitled to consider the testimony of the witness Neilsen, if you believe his testimony to be true, who testified as to making three trips to rum-running ships in the Pacific Ocean at the request of the defendant Marron, upon his order, and receiving three cargoes from the rum ships pursuant to the said orders, of his landing two boat loads of liquor in the City of San Francisco from such rum ships, pursuant to the orders obtained from the defendant Marron; and of his testimony that he was paid $3 per case for liquor so transported from the rum-running vessels at the defendant Marron's request, at 1249 Polk Street, in the City of San Francisco, by the defendant Marron—as to whether or not a conspiracy was established as alleged in the indictment."

To which ruling the petitioner then and there duly and regularly excepted. (Trans. pages 304-305; 497-499.)

It is the contention of petitioner that the admission into evidence of this testimony by the witness Neilsen is condemned by the case of *Terry v. United States,* 7 Fed. 2d p. 28, and that the instruction given by the Court to the jury is likewise in conflict with the law as established by that decision.

It will be observed that the indictment in the instant case charges a criminal conspiracy to violate the National Prohibition Act. It did not charge nor did the Government contend upon the first trial of this action that the defendants conspired to violate the Act of September 21, 1922, commonly known as the Tariff Act of 1922. The evidence of the witness Neilsen if believed, discloses a separate and distinct conspiracy and one which if true was of as serious a nature and character as the one charged in the indictment.

The indictment charged no conspiracy to transport, possess or sell smuggled liquor from the foreign rum ships and no overt act was averred that would have the most remote tendency to effect the object of such a conspiracy. This Court at page 30 of the *Terry* case expressed itself as follows:

> "Proof that the plaintiff in error was guilty of another crime was in itself prejudicial."

The testimony of Neilsen may be searched in vain for any reference direct or circumstantial tending to identify the character of any of the other defendants in this action with the transactions of Marron and we are entitled to assume that in so far as the other defendants are concerned they had neither interest in or any concern with these transactions.

Following the language of the *Terry* case therefore and at page 29:

> "There was no testimony of any kind, direct or circumstantial tending to connect any of the other defendants with this prior incident or transaction * * * in short there is no contention in the record tending to connect the defendants other

than Terry and Zucker with any conspiracy except such inferences as may be drawn from their presence at or in connection with the incident at Allen's Wharf and all the overt acts relate to that incident alone and the indictment charges no conspiracy to transport, possess or sell intoxicating liquor at Bodega Bay in terms and avers no overt act for the object of such a conspiracy if one existed."

The portion of the instruction of the Court was therefore particularly erroneous when the jury was told that these transactions might be considered by them as to whether or not a conspiracy was established as alleged in the indictment.

The same contention is made by this petitioner as was made in the *Terry* case, namely, that the charge in the indictment is limited to the alleged conspiracy entered into at 1249 Polk Street and does not extend to or include the incidents with the witness Neilsen (7 Fed. 2d pp. 29-30, Column 2):

"Ordinarily a charge of conspiracy is not circumscribed or limited by averments as to the time when or the place where the conspiracy was formed. The charge is limited, however, by the terms of the indictment itself. The indictment here charges but one combination or conspiracy, however diverse its objects, and no defendant could be convicted thereunder unless he was shown to be a member of or party to that conspiracy. Furthermore, the scope of the conspiracy must be gathered from the testimony, and not from the averments of the indictment. The latter may limit the scope but cannot extend it.

(4) Here we find no testimony tending to show any general conspiracy covering and including both the incident at Allen's Wharf and the inci-

> dent at Bodega Bay. On the other hand, every inference from the testimony is to the contrary. There is no testimony tending to show that the parties assembled at Allen's Wharf were parties to a conspiracy to transport, possess, or sell intoxicating liquor at Bodega Bay, six weeks before, or that they had any knowledge whatever of that transaction."

As the Court expressed itself in the *Terry* case the scope of the conspiracy must be gathered from the testimony and further by averments of the indictment. The indictment may limit the scope of the conspiracy but cannot extend it.

In practical effect Gorham and Kissane were convicted of one conspiracy. Birdsall and Mahoney were convicted of another conspiracy and this petitioner was convicted of a conspiracy to smuggle and transport liquor from foreign ships and this in face of the fact that the parties to the various conspiracies and the conspiracies themselves were entirely different in kind and nature.

At page 30 of the *Terry* case:

> "If, however, the charge of conspiracy in the indictment is merely that all the defendants had a similar general purpose in view and that each of four groups of persons were co-operating without any privity each with the other and not towards the same common end but towards separate ends similar in character, such a combination would not constitute a single conspiracy, but several conspiracies, which not only could not be joined in one count but not even in one indictment * * * In other words a conspiracy is not an omnibus charge, under which you can prove anything and everything, and convict of the sins of a lifetime."

See also,

Crowley v. United States, 8 Fed. 2d 118.

CONCLUSION.

This petitioner has set forth at length and commented upon both the evidence in the instant case and the law as interpreted by him in connection therewith, to fairly and impartially present to this Honorable Court the grounds of error upon which he relies.

It is conscientiously and honestly asserted that the rights of this petitioner have been violated, and it is respectfully submitted that the conviction of this defendant was unwarranted and in contravention of the fundamental rules of evidence and in violation of the sacred and long established constitutional rights of a citizen. The writ of certiorari should issue.

Dated, San Francisco,
February 19, 1927.

Respectfully submitted,
BENJAMIN L. MCKINLEY,
Counsel for Petitioner.

FILED
SEP 8 1937
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1936

No. [redacted] 185

JOSEPH E. MARDON,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

BRIEF FOR PETITIONER.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1926

No. 930

JOSEPH E. MARRON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

BRIEF FOR PETITIONER.

PART I.
HISTORY OF THE CASE.

The case arose in the United States District Court for the Northern District of California, Southern Division. Joseph E. Marron was indicted together with certain other persons for conspiracy among themselves and with others to the grand jury unknown for committing an offense against the United States. The indictment charged a crime under Section 37 of the Criminal Code of the United States in that Marron and the other defendants at the City and County of San Francisco in the Southern Division of the North-

ern District of California on the first day of May, 1923 and up to the time of filing of said indictment to-wit: the 17th of October, 1924 conspired together to violate certain provisions of the act of Congress of August 28, 1919 commonly known as the National Prohibition Act. (Trans. pages 3-50.) On the 5th day of January, 1925 after trial in the United States District Court, with the exception of the defendant Brand, who was acquitted, Marron, together with defendants George Birdsall, Charles Mahoney, Patrick Kissane and Joseph Gorham, were found guilty on a general verdict. Subsequently Marron and the defendants Birdsall, Kissane and Gorham sued out writs of error to review the judgment of conviction and the said judgment was affirmed as to all the defendants with the exception of Marron and as to him the Court reversed the judgment and directed the lower Court to grant him a new trial. (*Marron v. U. S.*, 8 Fed. Rep., Second Series, p. 251.) In accordance with that mandate Marron was again tried in the United States District Court and sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to review the judgment of conviction upon which said judgment Marron was sentenced to be imprisoned for two (2) years in the United States penitentiary at Leavenworth, Kansas and in addition thereto to pay a fine in the sum of ten thousand ($10,000.00) dollars. (Trans. page 84.) On error to the said Circuit Court of Appeals the judgment of the said District Court was affirmed on December 13, 1926, and a rehearing was denied on the 31st day of January, 1927. (*Marron v. U. S.*, 18 Fed. Rep., Second Series.

page 218.) Thereafter and on February 24, 1927, Marron filed his petition for a writ of certiorari, to the United States Circuit Court of Appeals for the Ninth Circuit and annexed to said petition a brief in support of his application.

Thereafter and on the 18th day of April, 1927, this honorable Court did pursuant to the provisions of Section 240 of the Judicial Code grant the writ of certiorari.

THE FACTS IN THE INSTANT CASE.

The facts involved in the present controversy and the law as contended should be applied to the facts, has been in the judgment of counsel, comprehensively set forth in the petition for the writ of certiorari above referred to and the annexed brief filed in support thereof and consequently it is neither the aim nor the desire of counsel to indulge in needless repetition as to either the facts or law in the present brief.

However, in the orderly treatment of the facts and the presentation of the law it is deemed necessary that this Court have before it in the present brief the facts as disclosed by the record so as to enable it to intelligently consider the additional points of law about to be presented.

On the second day of October, 1924, and for some time prior thereto Marron was the lessee and occupant of those certain premises located at No. 1249 Polk Street in the City and County of San Francisco. On the first day of October, 1924, a Federal Prohibi-

tion Agent filed with the United States Commissioner for the Northern District of California his affidavit in the following words and figures, to wit:

"United States of America,
Northern District of California,
County of Alameda.—ss.

On this 1st day of Oct., 1924, before me, Albert M. Hardie, a United States Commissioner in and for the Northern District of California, personally appeared C. A. Howard, who being first duly sworn, deposes and says:

That he is and at all of the times herein mentioned was a Federal Prohibition Agent and as such makes this affidavit and presents the facts and circumstances hereinafter set out that heretofore came to the personal knowledge of and as positively known to affiant to exist.

That this affidavit is made for the purpose of having issued hereon and hereunder a search-warrant to search the following described premises and place, to wit: 1249 Polk St., San Francisco, Cal., including the entire second floor, flat or club, all rooms, lockers, closets, safes, shelves, sheds, drawers, basement, attic, pantries, cupbards, ice boxes. Entire premises, name of owner, or occupant, Eddie Marron.

That in and upon the aforesaid premises and place and on or about the 22nd day of Sept., 1924, intoxicating liquor as defined by Section 1 of Title II of the Act of October 28, 1919, known as the National Prohibition Act, containing one-half of one per centum or more of alcohol by volume and fit for use for beverage purposes, was then and there and now are kept, sold, possessed and bartered in violation of Title II of the said National Prohibition Act, and particularly in violation of Sections 3 and 21 of said Title II.

That affiant on or about the 22d day of September, 1924, visited the above and foregoing mentioned and described premises and purchased

from the person in charge in said premises certain intoxicating liquor, to-wit: Fifteen drinks of Bourbon whiskey for which he paid fifty cents each; description of person in charge of premises: height, 5 ft. 7 in.; weight, about 165 lbs.; age, 47 yrs.; large nose, deep set eyes, slightly gray hair, high cheek bones; male.

That it will be necessary to enter the said premises and place to search the same end every part thereof in order to secure the said intoxicating liquor therein for the United States Government and that it will be impossible to secure the same or any part thereof without the aid and use of a search-warrant.

Wherefore, affiant applies for and prays that a search-warrant to enter the said premises and place *and therein to search for the said intoxicating liquor* be issued pursuant to the statute in such cases made and provided.

C. A. Howard.

Subscribed and sworn to before me this 1st day of October, 1924.

Albert M. Hardie,
United States Commissioner in and for the Northern District of California."

(Trans. pages 55-57.)

Thereafter and on the first day of October, 1924, a search-warrant was issued by the said United States Commissioner for the Northern District of California based upon the affidavit hereinbefore referred to. The search-warrant set forth the usual formal averments and concluded with the following direction:

"Now, therefore, pursuant to Section 25 of Title II of the said National Prohibition Act, you are hereby authorized and empowered to enter the premises and place mentioned, referred to and described in said affidavit, and every part thereof, in the day or night time and to thoroughly search

the same for the following described property, to wit: Intoxicating liquor, to wit, alcohol, (jackass brandy, corn whiskey, wine of pepsin, neuropin, pepsin rennin, fermented grape juice), brandy wine, port wine, and spirituous, vinous, malt and fermented liquors, liquids and compounds by whatever name called containing one-half of one per centum or more of alcohol and fit for use for beverage purposes, stills, worms, coils, mashes, goosenecks, hydrometers, essences, caramel, coloring materials, boilers, and if found to seize the same and take it into your possession to the end that the said property may be thereafter dealt with according to law, and hereof to make due return with written inventory of the property taken by you or any or either of you, within ten days as required by law.

Witness my hand and official seal this 1st day of October, 1924.

Albert M. Hardie,
United States Commissioner in and for the Northern District of California."

(Trans. pages 57-59.)

A due return was made and the property seized upon the said premises as the result of the search was inventoried upon the back of the search-warrant which inventory described in detail the various brands of alcoholic liquors seized at that time. (Trans. pages 75-76.)

At the time of the search the prohibition agents seized and carried away with them a certain ledger referred to in the testimony as the "gray ledger". The ledger purported to be a record of the business carried on at 1249 Polk Street. It showed the gross receipts and expenses and also an inventory of the liquor on hand on said date together with numerous other entries.

At the same time and under the same circumstances the said Federal Prohibition Agents carried away with them numerous private memoranda and private papers of various descriptions principally telephone, gas, electric and water receipts. Neither the said ledger nor any of the other private memoranda were located upon the person of Marron who was not present at the time of the search and seizure or his co-defendant Birdsall who was present at the time the search was made and who was subsequently arrested by the Federal Prohibition Officers; but on the contrary the said ledger and other memoranda were located in a closet in the premises. (Trans. pages 91-131.) Prior to the time of trial of said cause petitioner Marron made and filed his petition for the return of his various books, papers and documents and made in accordance therewith motions to suppress any evidence that might be given upon the trial. These motions were denied by the lower Court and exceptions to such orders were duly taken. The motions are set forth at length in the transcript pages 327-354.

Upon the trial before the United States District Court these various private books of account, papers and documents above referred to were introduced into evidence over petitioner's objections and exceptions duly taken thereon. (Trans. pages 91-131.)

The gray ledger in particular was introduced into evidence as United States "Exhibit A" and testimony was given with relation thereto by Federal Prohibition Agents and others. (Trans. pages 90-132.)

SPECIFICATION OF OBJECTIONS TO THE SEARCH AND SEIZURE OF MARRON'S PRIVATE PROPERTY.

The various objections to the illegal search and seizure of the petitioner's private property and the subsequent introduction into evidence of the seized papers and memoranda are designated as follows:

"a. The seizure of the said papers, records, books of account and ledgers, was made in contravention of the rights of the petitioner under the Fourth Amendment to the Constitution of the United States of America, *for the reason that papers, records, books of account and ledger were not particularly described in the search-warrant as things to be seized, as required by the said amendment.*

b. The said papers, records, books of account and ledger were not instruments or fruits of crime, but, on the contrary, were and are the private memoranda, the private property and the private papers, documents and writings of the defendant.

c. The said purported search-warrant only authorized the said Federal Prohibition Agents to search the said premises for the following described personal property, to wit:

'Intoxicating liquor, to wit, alcohol, brandy, wine of pepsin, neuropin, pepsin rennin, fermented grape juice and spirituous, vinous, malt and fermented liquors, liquids and compounds by whatever name called containing one-half of one per centum or more of alcohol and fit for use for beverage purposes, stills, worms, coils, mashes, goosenecks, hydrometers, essences, caramel, coloring materials, boilers.'

d. The said Federal Prohibition Agents above referred to, were at the time of executing the warrant, unlawfully upon the premises and were at said time and said place trespassers in taking the said papers, records, books of account and ledger.

e. The said papers, records, books of account and ledger were not upon the person of the defendant, but on the contrary were located in the said premises, hereinabove referred to at a time when the defendant was not present.

f. There was neither identification of the said papers, records, books of account and ledger, nor probable cause alleged in the affidavit for the seizure of the papers, records, books of account and ledger, and that their taking was illegal and void."

It is admitted that neither the ledger nor any of the other private memoranda seized upon the occasion were described in either the warrant or the affidavit nor were they even remotely referred to. In fact the record discloses that the agents had completed the object of their visit when they had reduced to their possession the intoxicating liquors found upon the premises and that the seizure of the ledger and the other private documents was made after their authority under the search-warrant had been exhausted. The legal proposition, therefore, before this honorable Court may be stated as follows:

Were the private books of account, papers and documents in the possession of the officers of the United States as the result of an illegal search and seizure; and if so were the constitutional rights of Marron under the Fourth and Fifth Amendments to the Constitution of the United States of America violated by the reception into evidence over his objection of these private books of account, papers and documents?

We propose to demonstrate to this honorable Court by the citation of its own authority and precedents

from Courts of inferior federal jurisdiction that the seizure of Marron's private documents and memoranda was illegal and that his constitutional rights under the Fourth and Fifth Amendments to the Constitution of the United States were flagrantly and prejudicially violated by their reception into evidence over his timely objections.

It is conceded that the character of this particular search and seizure has caused and created an irreconcilable conflict as shall hereafter be pointed out in the decisions of certain particular Circuits and it is apparent that the fundamental rights of citizens in respect to the security of their private documents should not depend upon a divergence of views of Courts of similar jurisdiction.

The United States Circuit Court of Appeals for the Ninth Circuit in its decision in *Marron v. U. S.* (8 Fed. Rep., Second Series, page 251), arrives at conclusions that are diametrically opposed to the conclusions reached by the United States Circuit Court of Appeals in *Kirvin v. U. S.* (5 Fed. Sec. Series, page 282); it bottomed its conclusion upon several authorities, to which we shall hereafter advert, but it relied principally upon a decision of its own, namely:

> *Sayers v. U. S.*, (C. C. A.) 2 Fed. Second Series page 146.

When the question was again presented upon a writ of error the said Circuit Court of Appeals refused to consider the question on its merits and concluded that it was foreclosed from doing so by virtue of its former

decision. (*Marron v. U. S.*, 18 Fed. Rep. Second Series, page 218.)

It may be observed in passing, therefore, that the second Marron decision is of no assistance in the determination of the question.

The United States Circuit Court of Appeals for the Second Circuit in its opinion in the case of *Kirwin v. U. S.*, 5 Fed. Second Series, page 282 decided under identical facts to be hereinafter set forth that the rights of the petitioner under the Fourth and Fifth Amendments to the Constitution of the United States were violated.

Part II.

THE LAW.

POINTS AND AUTHORITIES.

Point One: *Kirvin v. U. S.*, 5 Fed. Second Series, page 282, clearly interprets the letter and the spirit of the Fourth and Fifth Amendments to the Constitution of the United States and its conclusions should be adopted and followed rather than the conclusions reached in *Marron v. U. S.*, 8 Fed. Rep., Second Series, page 251.

THE LAW OF MARRON v. U. S., 8 FED. REP. SECOND SERIES, PAGE 251 AND AN ANALYSIS OF THE AUTHORITIES RELIED UPON IN THE DECISION TO SUPPORT THE CONCLUSIONS FOUND THEREIN.

The United States Circuit Court of Appeals for the Ninth Circuit in *Marron v. U. S.*, 8 Fed. Rep., Second Series, page 251, decided that:

a. Because the Federal Prohibition Agents had authority to search the premises they had authority to seize everything of evidentiary value which they found.

b. That when the officers entered the premises they found defendant Birdsall in the unlawful possession of liquor and in the act of maintaining a common nuisance and hence that the said Birdsall was committing a misdemeanor in their presence and as an incident to a lawful arrest of Birdsall the agents were justified in searching his person and seizing the evidence of his guilt although the evidence showed that the books, papers and memoranda were not located on the person of Birdsall but on the contrary were located in a closet on the premises.

c. That because of the provisions of Section 10 of Title II of the National Prohibition Act (41 St. 312, Sec. 8351i of Barnes' Code 1924 Cupp.; U. S. Comp. St., Par. 10138½E), petitioner and his codefendants were required to keep and maintain such records for the purpose of public inspection at any reasonable time by a commissioner or any of his agents or any public prosecutor or by any person designated by him and that therefore such a book was unlike the private papers of a citizen.

d. That the said ledger and other private memoranda were the means and instruments of crime.

e. That the fact that the papers, books and documents were not particularly described in either the affidavit or search-warrant as provided for by the Fourth Amendment to the Constitution was immaterial under the circumstances.

An analysis of the Marron decision discloses that the learned author of that opinion relied upon the decision rendered by the same Court in the case of *Sayers v. U. S.*, (C. C. A.) 2 Fed. Second, page 146. In that case the defendant was convicted of unlawful possession and sale of intoxicating liquor. It appeared that certain Federal officers entered the hotel operated by the defendant at the time, and after having served the officers with whiskey she was arrested by them, the premises were searched and a large quantity of beer together with a meat bill in her kitchen and a record of her savings and of beer purchasers and her electric light bill was seized.

An examination of the case does not disclose whether the Federal officers at the time were possessed of a search-warrant. Nor does it appear that the defendant made and filed appropriate motions to prevent the United States from introducing into evidence the various private memoranda and papers seized from her.

It would appear that the objections to the search and seizure and the subsequent introduction into evidence of the private books and memoranda were not raised in the lower Court but on the contrary were presented for the first time upon appeal; this conclusion may be fairly deduced from reading the language of the Court at page 147 as follows:

> "This prima facie validity of evidence offered prevails, *unless the accused challenges it*, and at least develops circumstances sufficient to impeach it to a degree that inspires the discretion of the trial judge to embark upon further inquiry, in which event, on all evidence adduced, the prose-

cution must sustain the competency of its evidence."

It is worthy of comment to observe in passing, therefore, that in the *Sayers* case the defendant was convicted of the unlawful possession and sale of intoxicating liquor, while in the instant case Marron was convicted of a felony, to-wit: criminal conspiracy and it is a matter of conjecture as to whether or not the conclusion arrived at in the *Sayers* case would have been the same had the defendant properly and appropriately raised the point as to the legality of the seizure and admissibility of the private books, and memoranda when offered in evidence.

The portion of the opinion in the *Sayers* case material to the present discussion is found on page 147.

> "A lawfully arrested person may be searched for instruments, fruits, and evidences of the crime; and, if taken in commission of the crime in a building, the latter may be likewise searched to the extent that the offender's control and activities likely extended. This is the law since the Fourth Amendment, even as it was law before, is reasonable, and is not within the amendment's ban upon unreasonable searches and seizures. See Adam's Case, 192 U. S. 585, 24 S. Ct. 372, 48 L. Ed. 575; Week's Case, 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177; Gouled's Case, 255 U. S. 309, 41 S. Ct. 261, 65 L. Ed. 647; U. S. v. Wilson (C. C.) 163 F. 338.
>
> In any such search, not only may the instruments and fruits of crime be seized but mere evidentiary articles, including papers incidentally discovered, may be likewise seized. This was expressly held in Adam's Case, supra, and has not been departed from in any qualification of said case. 'There is no special sanctity in papers, as

> distinguished from other forms of property, to render them immune from search and seizure, if only they fall within the scope of the principles of cases in which other property may be seized.' Gouled's Case, supra. Of a person arrested, every garment and pocket may be searched, and the same principle authorized that of a building, generally every room may be searched."

We are in accord with the academic principle that a person accused of crime may be searched, and instruments, fruits and evidences of crime may be seized from his person and from the premises in which the alleged crime has been committed, nor is a citation of authorities necessary to fortify the legality of seizures of the many evidences of crimes, of which the seizure of burglar tools and other *indicia* of crime offer typical examples.

But all of these cases are bottomed upon the assumption that the fruits and tools and other evidences of crimes have at first blush such a real and substantial relation to the crime or offense in the detection and apprehension of which the instrument was seized, that they form an integral part and parcel of the crime.

There is, however, such a real and substantial distinction between evidences of crime in the nature of burglar tools and articles of that character and private memoranda and documents of the character considered in the instant case, that the mere statement of their nature must, in and of itself, be sufficient to demonstrate the difference.

With great deference to the learned Judge who wrote the opinion in the *Sayers* case, we are con-

strained to assert that his conclusion finds no support in the authorities cited in the body of the opinion.

The importance of the question merits the consideration in detail of the authorities relied upon in the opinion.

ANALYSIS OF THE AUTHORITIES IN SAYERS v. U. S., 2 FED. SEC. 146.

In *Adams v. New York*, 192 U. S. 585, 48 Law Ed. 575, 24 Sup. Ct. Rep. 372, the plaintiff in error had been convicted in the Supreme Court of the State of New York for having in his possession certain gambling paraphernalia used in the game known as Policy in violation of the Penal Code of the State of New York. At the trial certain papers which had been seized by the police officers executing the search warrant for the discovery and seizure of policy slips, were offered in evidence over his objection. Pretermitting the question whether the Fourth and Fifth Amendments, applied to the action of the states, the Supreme Court proceeded to examine the alleged violations of the Fourth and Fifth Amendments, and based its decision upon the ground that the papers found in the execution of the search warrant, which warrant had a legal purpose in the attempt to find gambling paraphernalia, were competent evidence against the accused, and their offer in testimony did not violate his constitutional privilege against unlawful search and seizure, for it was held that such incriminatory documents thus discovered were not the subject of an unreasonable search and seizure, and, in fact, that the same were incidentally seized in the

lawful execution of a warrant, and not in a wrongful invasion of the home of a citizen, or the unwarranted seizure of his papers and property. It is interesting to note that the *Adams* case approved the doctrine that there was no valid objection to the use of papers that had been thus seized, and that the courts in the course of the trial would not make an issue to determine that question.

An examination of the case will disclose that no objection was taken at the trial to the introduction of the policy slips. The question raised was the receiving in evidence of private papers seized as a result of the search. The decision, however, did not turn upon this point so raised, but on the contrary turned upon a question of procedure as is illustrated by the following statement from the opinion:

> "In such cases the weight of authority, as well as reason limits the inquiry to the competency of the proffered testimony, and the Courts do not stop to inquire as to the means by which the evidence was obtained."

The opinion, therefore, assuming that the irregular seizure of private documents was immaterial in so far as their subsequent admission into evidence was concerned, *provided they bore some relation to the crime alleged*, proceeded to review various cases decided by the higher Courts of the different states to support their contention. The *Adams* case, therefore, made no attempt to discuss the nature or character of the documents so seized, and *in its conclusion discussed exclusively the relation of lottery tickets to gambling devices*, and to emphasize its position gave the favorite illustration of a search warrant being used for the

purpose of discovering stolen property and the incidental seizure of burglar tools in the execution of the seach warrant. We repeat with emphasis that the *Adams* case is no authority for the present proposition.

The law thus established by the *Adams* case, briefly stated, was that the admissibility of documentary evidence tending to establish the guilt of the accused of the offense charged, is not affected because it was secured in violation of the constitutional prohibition against unreasonable searches and seizures. This case was decided on February 23, 1904, and has been repeatedly cited and distinguished in a variety of cases from that time forward. It was not, however, until January 26, 1920, that the United States Supreme Court in the case of *Silverthorne Lumber Company v. United States of America*, 251 U. S. at page 385, 64 Law Ed. page 319, established a doctrine which, if not completely reversing the *Adams* case has in effect nullified the law as there established. Briefly stated, the facts were these: After an indictment had been returned against the plaintiff in error, he was arrested and detained in custody. While thus detained representatives of the Department of Justice, without the shadow of authority seized from his office certain books, papers and documents.

A timely application was made to the District Court for the return of the property, which was granted by the District Court, but photographs and copies of the originals having been taken were impounded. Subpoenas were thereupon served, requiring the production of the originals, and upon the refusal of the

plaintiff in error to obey, he was adjudged guilty of contempt of Court and fined. The Government, desiring to profit by its own wrong, sought to maintain its right to avail itself of the knowledge obtained by the illegal means of seizure, and hence to use the information obtained by that means, which it otherwise would not have had.

In its consideration of the question involved as to the admissibility in evidence of the documents wrongfully obtained and the compelling of the production of certain private papers, the opinion definitely disposed of the rule adopted in the *Adams* case in the following language:

> "The numerous decisions, like Adams v. New York, 192 U. S. 585, 48 Law Ed. 575, 24 Sup. Ct. Rep. at 372, holding that a collateral inquiry into the mode in which evidence has been got will not be allowed when the question is raised for the first time at the trial is no authority in the present proceedings. * * * *Now, whether some of these decisions have gone too far or have gone wrong it is unnecessary to inquire; the principle applicable to the present case seems to us plain.*"

We turn now to the consideration of the second authority relied upon in the *Sayers* case, namely, *Weeks v. United States*, 232 U. S. 383, 34 Sup. Ct. 341, 58 Law Ed. 652, and state, without fear of contradiction, that the *Weeks* case is not only opposed to the conclusion arrived at in the *Sayers* case, but on the contrary supports the position contended for by this plaintiff in error.

The defendant was arrested by a police officer without a warrant. The opinion states the facts as follows:

"Police officers had gone to the house of the defendant, and being told by a neighbor where the key was kept, found it and entered the house. They searched the defendant's room and took possession of various papers and articles found there, which were afterwards turned over to the United States marshal. Later in the same day police officers returned with the marshal, who thought he might find additional evidence, and being admitted by someone in the house, probably a boarder, in response to a rap, the marshal searched the defendant's room and carried away certain letters and envelopes found in the drawer of a chiffonier. Neither the marshal nor the police officers had a search warrant."

The defendant filed in the cause before the time for trial a petition for the return of the private papers, books and other property so seized. The opinion *inter alia* states as follows:

"The case in the aspect in which we are dealing with it involves the right of the court in a criminal prosecution to retain for the purposes of evidence the letters and correspondence of the accused, seized in his house in his absence and without authority, by a United States marshal holding no warrant for his arrest and none for the search of his premises. * * * If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and so far as those thus placed are concerned might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which had resulted in their embodiment in the fundamental law of the land. *The*

United States marshal could only have invaded the house of the accused when armed with a warrant issued as required by the Constitution, upon sworn information and describing with reasonable particularity the thing for which the search was to be made. Instead he acted without sanction of law, doubtless prompted by the desire to bring further proof to the aid of the government, and under cover of his office undertook to make a seizure of private papers in direct violation of the constitutional prohibition against such action. * * * We therefore reach the conclusion that the letters in question were taken from the house of the accused by an official of the United States acting under color of his office in direct violation of the constitutional rights of the defendant; that having made a seasonable application for their return, which was heard and passed upon by the court, there was involved in the order refusing the application a denial of the constitutional rights of the accused. In holding them and permitting their use upon the trial, we think prejudicial error was committed. As to the papers and property seized by the policemen, it does not appear that they acted under any claim of federal authority such as would make the amendment applicable to such unauthorized seizures. The record shows that what they did by way of arrest and search and seizure was done before the finding of the indictment in the federal court, under what supposed right or authority does not appear. What remedies the defendant may have against them we need not inquire, as the Fourth Amendment is not directed to individual misconduct of such official. Its limitations reach the federal government and its agencies. Boyd Case, 116 U. S. 616 (6 Sup. Ct. 524, 29 L. Ed. 746) supra, and see Twining v. New Jersey, 211 U. S. 78 (29 Sup. Ct. 14, 53 L. Ed. 97)."

It should be likewise noted that Mr. Justice Day who wrote the opinion in the *Adams* case was likewise

speaking for the Supreme Court in the *Weeks* case, and undoubtedly for the purpose of succinctly stating the principle decided in the *Adams* case, he used the following language in the *Weeks* case:

> "It is therefore evident that the Adams case affords no authority for the action of the Court in this case when applied to in due season for the return of papers seized in violation of the constitutional amendment. The decision on that case rests upon incidental seizure made in the execution of a legal warrant and in the application of the doctrine that a collateral issue will not be raised to ascertain the source from which the testimony competent in a criminal case comes."

Passing for the time the next case in order cited in the *Sayers* case, namely the *Gouled* case, we shall consider the last case cited, namely that of *United States v. Wilson*, 163 Fed. 338.

The decision in this case written by the District Judge arose as a result of the petition on behalf of the defendant for the return of certain personal property seized at the time of his arrest. It does not appear what was the nature of the accusation against the defendant, nor the character of the papers found in the trunk which were seized by the Government. It, therefore, is impossible to intelligently review that case for the purpose of distinguishing it from the instant case, but we respectfully direct the attention of this Court to the conclusion arrived at in the opinion, namely,

> *"assuming that the defendant was not entitled to return of the papers before the trial, and assuming further that the papers had not been obtained as the result of the unlawful search and seizure in violation of the Fourth Constitutional Amend-*

ment, nevertheless the objections were preserved to the defendant when the documents were offered as to their admissibility and on the ground that their use would be compelling the defendant to testify against himself contrary to the provisions of the Fifth Amendment."

Prior to our consideration and examination of the *Gouled* case, it is our intention to fortify our position in this respect with the authority of *Boyd v. United States*, 116 U. S. 630, 6 Sup. Ct. 524, 29 Law Ed. 746.

We refer to the *Boyd* case primarily for the purpose of having before us the clearest expression of the United States Supreme Court with respect to the sanctity of a man's private books and documents, together with the inception of the principles governing the limitations against unlawful searches and seizures and summary orders for the production of a man's private documents.

In the *Boyd* case a section of the Customs and Revenue Laws of the United States authorized the Court in the revenue cases, on motion of the Government's attorney to require the production by the defendant of certain books, records and papers in Court, otherwise the allegation of the Government's attorney as to their contents was to be taken as true. It was held that the act was unconstitutional, and void, and the principle definitely established that one cannot be compelled to produce his books and papers in a suit which seeks the forfeiture of his estate on pain of having the statement of Government's counsel as to the contents thereof taken as true and used as testimony for the Government.

The facts of the *Boyd* case and the principle established by it are not so important to us as are the reasons assigned by that tribunal in arriving at its conclusions.

Mr. Justice Bradley who delivered the opinion in that case undoubtedly regarded the principle involved, to-wit, the compulsory production of a man's private records, of such magnitude and importance, that he reviewed in detail the history of the law relating to searches and seizures, and from his research upon this subject this monumental epic of American jurisprudence resulted. The question involved in the case is presented in the following language:

> "The principal question, however, remains to be considered. Is a search and seizure or, what is equivalent thereto, a compulsory production of a man's private papers, to be used in evidence against him in a proceeding to forfeit his property for alleged fraud against the revenue laws—is such a proceeding for such a purpose an '*unreasonable* search and seizure' within the meaning of the Fourth Amendment of the Constitution? Or is it a legitimate proceeding? It is contended by the counsel for the Government that it is a legitimate proceeding, sanctioned by long usage, and the authority of judicial decision. No doubt long usage acquiesced in by the courts, goes a long way to prove that there is some plausible ground or reason for it, in the law or in the historical facts which have imposed a particular construction of the law favorable to such usage. It is a maxim that *Consuetudo est optimus interpres legum:* and another maxim that *Contemporanea expositio est optima et fortissima in lege.* But we do not find any long usage or any contemporary construction of the Constitution which would justify any of the Acts of Congress now under consideration. As stated before, the Act of 1863

was the first Act in this country, and we might say either in this country or in England, so far as we have been able to ascertain, which authorized the search and seizure of a man's private papers or the compulsory production of them, for the purpose of using them in evidence against him in a criminal case, or in a proceeding to enforce the forfeiture of his property. Even the Act under which the obnoxious writs of assistance were issued, did not go as far as this, but only authorized the examination of ships and vessels and persons found therein, for the purpose of finding goods prohibited to be imported or exported, or on which the duties were not paid; and to enter into and search any suspected vaults, cellars, or warehouses for such goods. *The search for and seizure of stolen or forfeited goods or goods liable to duties and concealed to avoid the payment thereof are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ toto coelo. In the one case the Government is entitled to the possession of the property; in the other it is not.* * * * But when examined with care, it is manifest that there is a total unlikeness of these official acts and proceedings to that which is now under consideration. In the case of stolen goods, the owner from whom they were stolen is entitled to their possession; and in the case of excisable or dutiable articles, the Government has an interest in them for the payment of the duties thereon, and until such duties are paid has a right to keep them under observation, or to pursue and drag them from concealment; and in the case of goods seized on attachment or execution, the creditor is entitled to their seizure in satisfaction of his debt; and the examination of a defendant under oath to obtain a discovery of concealed property or credits is a proceeding merely civil to effect the ends of justice, and is no more than what the court of

chancery would direct on a bill for discovery; whereas, by the proceeding now under consideration, the court attempts to extort from the party his private books and papers to make him liable for a penalty or to forfeit his property."

The opinion reviews and quotes at length from Lord Camden's memorable discussion of the subject in *Entick v. Carrington,* reported in 19 Howell, St. Tr. 1029. The opinion states *inter alia:*

"Papers are the owner's goods and chattels; they are his dearest property; and are so far from enduring a seizure that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet, where private papers are removed and carried away the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such power? I can safely answer, there is none; and, therefore, it is too much for us, without such authority, to pronounce a practice legal which would be subversive of all the comforts of society.

"But though it cannot be maintained by any direct law, yet it bears a resemblance, as was urged, to the known case of search and seizure for stolen goods. I answer that the difference is apparent. In the one I am permitted to seize my own goods, which are placed in the hands of a public officer, till the felon's conviction shall entitle me to restitution. In the other, the party's own property is seized before and without conviction, and he has no power to reclaim his goods, even after his innocence is declared by acquittal.

"The case of searching for stolen goods crept into the law by imperceptible practice. No less a person than my Lord Coke denied its legality (4 Inst. 176); and, therefore, if the two cases resembled each other more than they do, we have no

right, without an Act of Parliament, to adopt a new practice in the criminal law which was never yet allowed from all antiquity. Observe, too, the caution with which the law proceeds in this singular case. There must be a full charge upon oath of a theft committed. The owner must swear that the goods are lodged in such a place. He must attend to the execution of the warrant, to show them to the officer, who must see that they answer the description. * * *

"If it should be said that the same law which has with so much circumspection guarded the case of stolen goods from mischief, would likewise in this case protect the subject by adding proper checks; would require proofs beforehand; would call up the servant to stand by and overlook; would require him to take an exact inventory, and deliver a copy, my answer is that all these precautions would have been long since established by law, if the power itself had been legal; and that the want of them is an undeniable argument against the legality of the thing. * * *

"Lastly, it is urged as an argument of utility, that such a search is a means of detecting offenders by discovering evidence. I wish some cases had been shown, where the law forceth evidence out of the owner's custody by process. There is no evidence against papers in civil causes. It has been often tried but never prevailed. Nay, where the adversary has by force or fraud got possession of your own proper evidence, there is no way to get it back but by action. In the criminal law such a proceeding was never heard of; and yet there are some crimes, such, for instance, as murder, rape, robbery and house breaking, to say nothing of forgery and perjury, that are more atrocious than libeling. But our law has provided no paper search in these cases to help forward the conviction. Whether this proceedeth from the gentleness of the law towards criminals, or from a consideration that such a power would be more

> pernicious to the innocent than useful to the public, I will not say. It is very certain that the law obligeth no man to accuse himself because the necessary means of compelling self accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it would seem that search for evidence is disallowed upon the same principle. Then, too, the innocent would be confounded with the guilty."

The concluding reference in the opinion is likewise of importance in our consideration of the violation claimed under the Fifth Amendment. At page 752, Law Ed., we find the following language:

> "We have already noticed the intimate relation between the two Amendments. They throw great light on each other. For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself', which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. We think it is within the clear intent and meaning of those terms."

We turn now to consideration of *Gouled v. United States*, 255 U. S. 298, 41 Sup. Ct. 261, 65 Law Ed. 647, which decision in our judgment, is complete authority for the contention now being urged on behalf of the plaintiff in error.

This case has been cited as authority in numerous decisions since the date of its rendition on the 28th of October, 1921, and it has unquestionably become the leading case upon the question of searches and seizures throughout the United States.

An examination of the case will disclose that six questions were certified to the Court by the United States Circuit Court of Appeals for the Second Circuit.

Briefly stated, the facts were that the plaintiff in error Gouled, one Vaughan and an attorney at law were charged with being parties to a conspiracy to defraud the United States in violation of Section 37 of the Federal Criminal Code, and in the second Count in the indictment were charged with having used the mails to promote a scheme to defraud the United States in violation of Section 215 of the Code. Gouled was convicted. An appeal was prosecuted, and the matter came before the United States Supreme Court for a certification of six questions.

The first two questions concerned the admission in evidence of a paper surreptitiously taken from the office of Gouled by officers of the Intelligence Department of the Army. With this feature of the case, namely, the surreptitious and furtive taking of a man's papers, we have no concern.

The remaining four questions, however, related to papers taken from the defendant's office *under two valid search-warrants,* and it is with these questions that we are vitally concerned.

The *Gouled* case, therefore, may be definitely segregated and construed as establishing two propositions, namely (Firstly), Surreptitious and furtive taking of a man's private documents; and (Secondly) the seizing of them *under a valid search-warrant*.

The private documents of Gouled, seized under the search-warrant, consisted of an unexecuted form of contract between him and one Lavinsky; a written contract executed by the defendant and one Steinthal, and the third a bill for disbursements and professional services rendered by an attorney at law for and on behalf of Gouled. These various documents were alleged in the petition upon which the search-warrant was issued, to have been used in the commission of a felony, to-wit, the bribery of an officer of the United States; it was further alleged in another affidavit that Gouled had at his office certain letters, papers and documents and writings which were related to and had been used in the commission of a felony, to-wit, conspiracy to defraud the United States, upon which charge the defendant Gouled was before the Court.

Subsequent to the seizure of these papers, an indictment was returned and prior to the trial a motion was made on behalf of Gouled for the return of the papers seized under the search-warrant, which motion was denied.

A duplicate original of the Steinthal contract and the original Lavinsky contract, together with the bill for attorney's fees, were offered and admitted into evidence over the Constitutional objections of Gouled, to-wit, the violation of his rights under the Fourth and Fifth Amendments.

Mr. Justice Clark, in his conclusion, made plain the distinction between a search for stolen and forfeited property, counterfeit coins, burglar tools, weapons, implements of gambling and other things of like character. Unquestionably these things were enumerated expressly in the opinion to emphasize the distinction between them and the private books, writings and documents of a citizen, and he likewise was careful to preserve the rights of seizure under search-warrants of private papers, but he added:

> "they may be resorted to only when the primary right of such search and seizure may be found in the interest which the public or complainant may have in the property to be seized, but not the right to the possession of it, or where the valid exercise of the police power renders possession of the property by the accused unlawful, and provides that it may be taken (Boyd v. United States).
>
> "There is no special sanctity in papers as distinguished from other property to render them immune from search and seizure *if only they fall within the scope of the purpose of the cases in which other property may be seized and if they be adequately described in the affidavit and warrant.*"

The third question certified for consideration is, in the language of the opinion, as follows:

> "Are papers of no pecuniary value, but possessing evidential value against persons presently suspected and subsequently indicted under Secs. 37 and 215 of the United States Criminal Code when taken under search warrants issued pursuant to the Act of June 15th, 1917, from the house or office of the person suspected,—seized and taken in violation of the 4th Amendment?
>
> That the papers involved are of no pecuniary value is of no significance. Many papers, having

no pecuniary value to others, are of the greatest possible value to the owners, and are property of a most important character. (Boyd Case, 116 U. S. 627, 628, 29 L. Ed. 749, 750, 6 Sup. Ct. Rep. 524); and since those here involved possessed 'evidential value' against the defendant, we must assume that they were relevant to the issue.

Restraining the questions to the papers described, and first, as to the unexecuted form of contract with Lavinsky, a stranger to the indictment: While the contents of this paper are not given, it is impossible to see how the government could have such an interest in such a paper that, under the principles of law stated, it would have the right to take it into its possession to prevent injury to the public from its use. The government could desire its possession only to use it as evidence against the defendant, and to search for and seize it for such purpose was unlawful.

Likewise the public could be interested in the bill of the attorney for legal services only to the extent that it might be used as evidence, and the seizure of this also was unlawful.

As to the contract with Steinthal, also a stranger to the indictment: It is not difficult, as we have said, to imagine how an executed written contract might be an important agency or instrumentality, in the bribing of a public servant, and in perpetrating frauds upon the government, so that it would have a legitimate and important interest in seizing such a paper in order to prevent further frauds upon the government, but the facts necessary to give this contract such a character do not appear in the certificate. On the contrary, this third question recites that the papers are all of no pecuniary, but are of evidential value, and in the sixth question it is recited that they are 'of evidential value only', so that it is impossible to say, on the record before us, that the government had any interest in it other than an evidence against the accused; and

therefore, as to all three papers, the answer to the question must be in the affirmative."

The fourth question reads:

"If such papers, so taken, are admitted in evidence against the person from whose house or office they were taken, such person being then on trial for the crime for which he was accused in the affidavit for warrant,—is such admission in evidence a violation of the Fifth Amendment?

The same papers being involved, the answer to this question must be in the affirmative; for, they having been seized in an unconstitutional search, to permit them to be used in evidence would be, in effect, as ruled in the Boyd case to compel the defendant to become a witness against himself."

The next question in order for consideration related to the violation of the defendant's rights under the Fifth Amendment by the subsequent admission of the seized documents into evidence, and in the language of the opinion.—

The fifth question reads:

"If, in the affidavit for search warrant under Act of June 15, 1917, the party whose premises are to be searched be charged with one crime, and property be taken under the warrant issued thereon, can such property so seized be introduced in evidence against said party when on trial for a different offense?

It has never been required that a criminal prosecution should be pending against a person in order to justify search for and seizure of his property under a proper warrant, if a case of crime having been committed and of probable cause is made out, sufficient to satisfy the law and the officer having authority to issue it, and we see no reason why property seized under a valid search warrant, when thus lawfully obtained by

> the government, may not be used in the prosecution of a suspected person for a crime other than that which may have been described in the affidavit as having been committed by him. The question assumes that the property seized was obtained on a search warrant sufficient in form to satisfy the law; and if the papers to which the question refers had been of a character to be thus obtained, lawfully, it would have been competent to use them to prove any crime against the accused as to which they constituted relevant evidence."

The sixth question inquired as to the duty of the trial Court to inquire into the origin of and the method adopted in procuring the papers when the documents are offered in evidence against the party indicted. The Court answered the question as follows:

> "The papers being of 'evidential value only' and having been unlawfully seized, this question really is, whether, it having been decided on a motion before trial that they should not be returned to the defendant, the trial court, when objection was made to their use on the trial, was bound to again inquire as to the unconstitutional origin of the possession of them. It is plain that the trial court acted upon the rule, widely adopted, that courts in criminal trials will not pause to determine how the possession of evidence tendered has been obtained. While this is a rule of great practical importance, yet, after all, it is only a rule of procedure, and therefore it is not to be applied as a hard-and-fast formula to every case, regardless of its special circumstances. We think, rather, that it is a rule to be used to secure the ends of justice under the circumstances presented by each case; and where, in the progress of a trial, it becomes probable that there has been an unconstitutional seizure of papers, it is the duty of the trial court to entertain an objection to their admission, or a motion for their exclusion,

> and to consider and decide the question as then presented, even where a motion to return the papers may have been denied before trial. A rule of practice must not be allowed for any technical reason to prevail over a constitutional right."

Whether or not this language may be construed as a complete disapproval of the doctrine laid down in the *Adams* case becomes immaterial if it be conceded that the papers were in the first instance illegally taken.

It will be observed that in none of the authorities that we have reviewed up to the present, which authorities have been relied upon by the United States Circuit Court of Appeals for the Ninth Circuit in support of its conclusion, has the proposition involved in this case, been directly passed upon, namely the *failure of the search-warrant to describe the article or thing to be seized.*

We turn now to a consideration of the authorities relied upon by Marron in support of his position.

THE SEIZURE OF THE PAPERS, RECORDS, BOOKS OF ACCOUNT AND THE LEDGER WAS MADE IN CONTRAVENTION OF THE RIGHTS OF MARRON UNDER THE FOURTH AND FIFTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA, FOR THE REASON THAT SAID PAPERS, RECORDS, BOOKS OF ACCOUNT AND LEDGER WERE NOT PARTICULARLY DESCRIBED IN THE SEARCH-WARRANT AS THOSE TO BE SEIZED AS REQUIRED BY THE SAID AMENDMENTS.

The law governing seizures and searches and warrants as appearing in the Fourth Article of the Amendment to the Constitution of the United States is as follows:

> "Section I. The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon reasonable cause supported by oath or affirmation, *and particularly describing the* place to be searched and the persons or *things* to be seized."

The Fifth Article of Amendments to the Constitution relating to criminal proceedings and condemnation of property reads:

> "Section I. No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of grand jury, except in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger; nor shall any person be subject, for the same offense, to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself;* nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

The significance of the language of the Fourth Amendment "particularly describing the place to be searched and the persons or things to be seized" is of supreme importance in guiding us in our endeavor to demonstrate the violation of the rights of the petitioner under this amendment.

Innumerable decisions of our Federal Courts have construed their meaning, and we are not compelled to go far afield in our research for decisions to fortify our position. In fact, the Circuit Court of Appeals for the Ninth Circuit, in the case of *Hagen v. U. S.,*

4 Fed. 2d. 801, had occasion to consider a similar contention under facts which bear a startling similarity to the facts in the instant case, and it is worthy of comment that the *Hagen* case was not referred to by the learned Judge who wrote the opinion in the first *Marron* case.

The facts in the *Hagen* case were briefly these: A prohibition agent testified that he went to the dwelling house of defendant Hagen and, after serving the search-warrant upon him, proceeded to search his house and found therein certain intoxicating liquors. In addition to the seizure of these intoxicating liquors, the agents likewise seized a certain book, together with some papers and cards which were subsequently introduced into evidence upon his trial for conspiracy to violate the National Prohibition Act. The question before the Circuit Court concerned the validity of the search-warrant.

The Commissioner issued the warrant, commanding the prohibition officer to enter the premises described in the affidavit and to then and there diligently "investigate and search the same, and into and concerning said crime, and to search the person of said Ed. Hagen and employees, and from him or her, or from said premises, seize any and all of the said property so used in or about the commission of said crime, and then and there take the same into possession, and a true report make".

The officer returned the warrant, stating that he had found certain described quantities of whiskey and beer and various letters, books, papers, cards and ac-

counts in possession of the various defendants. It appears, therefore, that both the affidavit and the search-warrant were broader in the *Hagen* case than they were in the *Marron* case, for the reason that in the *Hagen* case they specifically referred to property used as the means of committing a crime, and the officer who made a return on the search-warrant likewise described the seizure of said private books and memoranda which was not done by the officer who made the return upon the warrant in the *Marron* case. In reversing the judgment of conviction for the crime of conspiracy against Hagen, the Circuit Court of Appeals for the Ninth Circuit condemned the search and seizure in the following language:

> "Nor was there any statement that in the house there were documents or books or memoranda tending to show unlawful sale of intoxicating liquor, *or that Hagen had in his personal possession any writings or other evidence connecting him with a violation of the prohibition law, nor was there any attempt to describe the books or documents or papers to be seized from Hagen, or anybody else.*"

That Hagen's rights under the Fifth Amendment to the Constitution were violated by the reception into evidence of these private memoranda and books of account, was likewise affirmed in the decision with this language:

> "The legal effect of such a search and seizure of papers was to force the person seized to become the unwilling source of evidence against himself, and put him in a position where he can invoke that protection afforded him by the Fourth and Fifth Amendments to the Constitution and by the Acts of Congress."

We again call to the attention of this Honorable Court the undisputed fact that the search-warrant in the instant case described no article or thing other than intoxicating liquors and paraphernalia used in their manufacture.

As stated above, the learned Judge who wrote the original *Marron* opinion not only failed to recognize the doctrine in the *Hagen* case, but neglected to even comment upon the principle involved therein.

We invite attention to the case of the *United States v. Mills,* 185 Fed. 318. This proceeding came before the Circuit Court of New York on the petition for instructions to be directed to the United States Marshal, of that District, and the District Attorney, to return to defendants certain books and papers which had been seized pursuant to a bench-warrant.

The defendants were co-partners and were indicted for conspiracy to defraud the United States as a result of false and fraudulent invoices alleged to have been made by them on foreign merchandise. A bench-warrant for the arrest of the defendants was issued, and the Marshal, in addition to arresting the defendants, searched for, found, seized and removed from the premises of the defendants a large number of books and papers, which were subsequently delivered to the District Attorney.

The bench-warrant referred to in the opinion commanded the Marshal to arrest the three defendants, describing particularly the persons to be seized, but not particularly describing the place to be searched and the *things to be seized.*

The Court said (page 319):

"When executing the bench-warrant, the marshal seized not only the documents concerned in the particular importation of December 3, 1906, but also all the books and papers of the firm covering their business above referred to. Having examined these, the district attorney states that they disclose evidence of further offenses, as to which he is about to advise the grand jury that 'further indictments, charging additional offenses than those contained in the indictment already found, could be found'.

It may be highly desirable, from the point of view of a prosecuting officer, that some such comprehensive seizure of a person's books and papers should be had; the trial of an offense thus charged may be thus facilitated, and it may be easier to discover that the same person has been guilty of other similar offenses. It may promote the ends of justice that the right to search and seize should be strengthened rather than impaired. It may be that there is 'much less danger of doing injustice to the individual than there is of overlooking the obligations of those in authority to organized society'. Opinions will differ as to which is the wiser public policy. But, whatever may be one's individual opinion, it is difficult to see how a subordinate federal court can sustain such a wholesale seizure as we have here, so long as the decision of the Supreme Court in Boyd v. U. S., 616, 6 Sup. Ct. 524, 29 L. Ed. 746, remains unreversed and unqualified. It certainly has never been reversed, and the subsequent decisions of the Supreme Court in which it has been referred to do not indicate that the practice followed in this case should be approved.

In Adams v. New York, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575, the court is careful to point out that the only question before it was as to the introduction in testimony of papers found on defendant's premises at the time of his arrest."

A similar question was presented to the United States Circuit Court of Appeals of the Second Circuit, in the case of *Fitter et al. v. United States,* 258 Fed. 567. The facts were as follows:

The defendant claimed that he was forced to furnish incriminating evidence against himself, and that he was convicted upon evidence secured in an unlawful and illegal manner and in violation of his constitutional rights. It appears that, acting under instructions given by the United States Attorney or his assistant, an officer belonging to the United States Secret Service came to the defendant's place of business in the absence of Fitter, and demanded that Fitter's wife allow him to examine the ledger, delivery slips, receipts, and check books. This demand was complied with, and certain slips and papers were taken away. An hour later an automobile drove up, and two men entered the store, one of whom wore a naval uniform, the other one said he was a secret service agent. They entered the back office and called for "Ledger, ledger, contract ledger". Mrs. Fitter at that time was working on the ledger. The man in uniform grabbed the ledger and carried it out of the store. And as the two left, one of the men said he was going to bring the ledger back after comparing it with the delivery slips. Mrs. Fitter did not see the delivery slips, papers and contract ledger again, however, until she saw them in the office of the United States Attorney on November 27, 1917.

On November 14, 1917, four days after the illegal seizure of the defendant's ledger and papers, the

United States Attorney for the Eastern District of New York was requested to return the ledger, and an offer was made to preserve the ledger in its then condition. No attention was paid to this request, and the ledger was not returned.

Thereafter, and before the trial of this action, a motion was made for the return of the ledger, papers, and slips which had been unlawfully seized, and by direction of the Court the ledger and some of the papers were turned over by the United States Attorney to counsel for the defendant.

Neither of the men who examined the defendant's books and papers had a search-warrant authorizing them to examine or to seize either the books or the papers. The testimony of the officers is that no forcible seizure was made, but that a request was made which was acceded to by Fitter's wife. What was done was undoubtedly an arbitrary and unlawful violation of Fitter's constitutional rights. The Fourth Amendment to the Constitution provides:

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment, provides, *inter alia*, that no person—

> "shall be compelled in any criminal case to be a witness against himself".

In the *Petition of Barber,* 281 Fed. 550, the facts were practically identical with the facts in the instant case, and it is difficult to perceive how a distinction may be drawn between the principles controlling this case and the principles for which we are contending in the present case.

The *Barber* case arose as a result of a petition filed, seeking the return of certain malt, hops, rye, sugar, bottles, and other paraphernalia intimately connected with the manufacture and disposition of intoxicating liquor, *together with certain books, letter files, ledgers, papers, records, advertising matter, and stationery used in the conduct of the business of petitioner, namely, selling hops, malt, materials, supplies and other merchandise which he alleged were unlawfully seized and taken from his place of business in the City of Detroit.* The affidavit upon which the search-warrant was issued is quoted at length in the opinion, as is likewise the search-warrant material to our discussion.

> "Now, therefore, in pursuance with the provision of the law and particularly the National Prohibition Act, relating to the prohibition of the sale and possession of malt, hops, capping machines, caps, bottles and other utensils and property designed for the manufacture of liquor intended for use in violating the National Prohibition Act, and upon probable cause shown, you are hereby authorized to enter the said premises in the day with the necessary and proper assistance, and thoroughly search the premises aforesaid for all subjects and evidence of fraud against the government of the United States and for violation of the National Prohibition Act, including the property above mentioned, to the end that

such violations may be discovered and restrained, and that all offenders and property forfeited may be dealt with according to law, and hereof make due return without delay.

"Witness, the hand and the official seal of the said commissioner, at Detroit, Michigan, in said district, this 3rd day of March, A. D. 1922.

(Signed) J. Stanley Hurd,
United States Commissioner, Eastern District of Michigan."

Various objections were raised by Barber as to the validity of the search-warrant, among one of which was the following:

"That said search warrant did not expressly command the seizure of the property found by the search, but left indefinite and discretionary the property to be seized by the search."

The Court's disposition of various objections is not germane to this discussion, excepting the conclusion arrived at, based upon the objection hereinbefore set forth.

"* * * It is not claimed by petitioner that any person was misled or prejudiced by such description, and I cannot doubt that the objection based upon the alleged indefiniteness of description of such property or supposed variance between the property so described and the property seized must be overruled, except as to the books, files, ledgers, records, advertising matter, stationery, and papers seized, but not described nor mentioned in the affidavit or in the search warrant.

It is plain that, as the latter were not described nor even mentioned in the affidavit or search-warrant, their seizure thereunder was unauthorized for that reason, even if otherwise subject to

seizure, and if, actually seized and still retained, they must be forthwith returned to petitioner. United States v. Mills, 185 Fed. 318; Fitter v. United States (C. C. A. 2), 258 Fed. 567, 169 C. C. A. 507."

In *United States v. Hills,* 263 Fed. 812, the proposition is so succinctly stated that we take the liberty of quoting the decision in full:

"It appearing, upon inspection, that the description in the search warrant contained of the things to be seized thereunder did not embrace any papers or documents of the defendant, and that therefore it was not broad enough to include the letter from Alonzo Taylor to the defendant, dated April 14, 1919, the defendant was on his petition heretofore filed herein, entitled to a return of the said letter, and an order may be so taken. Weeks v. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177; U. S. v. Friedberg (D. C.), 233 Fed. 313; State v. Slamon, 73 Vt. 212, 50 Atl. 1097, 87 Am. St. Rep. 711.

And it further appearing that the said letter was improperly admitted in evidence against the defendant's exception, and that the same was prejudicial to the defendant, the verdict will be set aside, and a new trial of this cause granted."

See also:

Amos v. U. S., 255 U. S. 313, 41 Sup. Ct. 266, 65 L. Ed. 654;

U. S. v. Porazzo Bros., 272 Fed. 276.

KIRVIN v. UNITED STATES, 5 FED. 2d 282, SHOULD BE FOLLOWED AS AN AUTHORITY ON THE FACTS IN THE INSTANT CASE RATHER THAN THE FIRST DECISION IN MARRON v. UNITED STATES, 8 FED. 2d 251.

Judge McCamant, the author of the opinion in the *Marron* case, disposed of the law as enunciated in the *Kirvin* case, with the following language at page 256 of the report:

> "The defendants rely on Kirvin v. U. S. (C. C. A. 2), 5 Fed. 282. It may be conceded that this decision cannot be reconciled with the views above expressed. We have great respect for the Court which handed down this opinion, but we prefer to follow our own precedents. We still think that Sayers v. U. S., 2 Fed. 2d 146, was correctly decided."

The *Kirvin* case came before the Circuit Court of the 2nd Circuit under the following circumstances: An application had been made by Harold A. Kirvin to quash, vacate and set aside a search-warrant affecting the premises located at No. 191 Front Street, Borough of Manhattan, City of New York, and for a return of records, papers and documents seized thereunder. The original application was made before the United States Commissioner who sustained the application. Thereupon the District Court of New York reviewed the action of the United States Commissioner and duly gave his order reversing the action of the Commissioner. Thereafter the petitioner appealed to the United States Circuit Court of Appeals, which Court in turn reversed the action of the United States District Court. The facts briefly are these: A search-warrant was issued on the 18th day of De-

cember, 1923, by one of the United States Commissioners for the Southern District of New York. The affidavit upon which the search-warrant was issued alleged an unlawful sale of intoxicating liquor upon these premises and concluded with the averment that it was necessary to procure a search-warrant to search the said premises and to seize all intoxicating liquor found therein, *together with any books, papers, records, or documents pertaining to the sale, possession or transportation of intoxicating liquors.*

A search-warrant was thereupon issued on the affidavit above referred to and after describing the premises to be searched directed the officers to search diligently "for said liquors and records" and directed the making of a return if any seizure was made under said warrant.

A seizure was made and resulted in obtaining a quantity of liquor and also a large list of books, papers and records consisting of many telegrams, invoices, receipts and various letters.

It is worthy of comment at this time to state that not only the affidavit in this case but the search-warrant itself directed the officers to seize not only the liquor in question, but contained likewise an omnibus direction to seize records, papers and documents; it would appear therefore that the search-warrant was to that extent more comprehensive than the search-warrant in the instant case, for here the warrant is silent as to things to be seized other than intoxicating liquors and paraphernalia used in their manufacture. The first contention made in the *Kirvin* case, and the

first contention made by the Government in the instant case, that as to the records seized, the search-warrant was issued without probable cause, is answered by that learned Court in the following language:

> "We need not consider the sufficiency of the allegations as to the liquor seized for that seizure is not now questioned. The affidavit in no place refers to any record being used in connection with the sale of alcohol, and there is no description of the records, papers, or memoranda of any kind. The only reference to it is in the last few lines in the affidavit, which says, 'and to seize all intoxicating liquors found therein, together with any papers, books, records or documents pertaining to the sale, possession or transportation of intoxicating liquors'. This allegation does not warrant the seizure of papers nor could any testimony before the commissioner supply what is here missing."

One of the arguments of the Government in that case, and the principal argument of the Government in this case, which contention the learned Judge who wrote the opinion for this Court in the *Marron* case, evidently adopted, was that the records, papers and documents so seized were means or instruments or fruits of crime.

We can do no better than to quote the language of the *Kirvin* case in answer to this contention:

> "We cannot agree with the government's argument that the records were means or an instrument of crime. They might be some evidence of crime. Gouled v. U. S., 225 U. S. 310, 41 S. Ct. 261, 65 L. Ed. 647. *The legality of the search-warrant may become the very foundation upon which the successful prosecution of a guilty defendant depends. The constitutional rights guaranteed by the Fourth Amendment of the Consti-*

tution must be equally enforced in favor of the guilty and innocent. Unless sufficient facts are shown under oath to support the finding of a probable cause, the right of a person to be secure from unreasonable searches and seizures must not be violated. Silverthorne Co. v. U. S., 251 U. S. 385, 40 S. Ct. 182, 64 L. Ed. 319; Weeks v. U. S., 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177; Boyd v. U. S., 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746. A search-warrant must be as broad, and no broader, than justifying the basis of fact. It is not every kind of property that may be seized, under a search-warrant. It is intended that the warrant be issued with the privilege to seize such property as was used as the means of committing a felony. *All papers and documents which afford evidence that a felony has been committed, but which were not the means of committing it, are immune from seizure.* Veeder v. U. S., 252 Fed. 414, 164 C. C. A. 338."

The next contention of the Government in the *Kirvin* case was that the officers who were executing the warrant were lawfully on the premises, and, being there, they might seize the papers in question. That contention is answered in the following language:

> "But as to the records they had no search-warrant. They were as trespassers in taking these documents."

The next contention was that the plaintiff in error, Kirvin, was arrested at the time the papers were seized and therefore the seizure was lawful.

> "But the papers were not on his person, and the distinction has been recognized between what one carries about on his person and what one keeps in his house. A search-warrant cannot be extended beyond the privileges granted in its

> issuance. Nothing further may be included. There was neither identification of the records, nor probable cause alleged in the affidavits for the seizure of the records, and their taking was illegal, and therefore void."

We are aware that as the result of the complex structure of the various Federal Courts of the United States, numerous conflicts in the decisions of the various Courts are found, but we assert that a research of the various decisions will fail to disclose a more startling conflict in authority upon a question that involves rights of such a fundamental character.

It is impossible to distinguish the *Marron* case and the *Kirvin* case for the purpose of reconciling either the law or the facts.

THIS HONORABLE COURT HAS HAD OCCASION TO DISAPPROVE OF A PORTION OF THE MARRON OPINION BY ITS RECENT DECISION IN THE CASE OF U. S. v. KATZ, 70 ED. 554.

The learned Judge who wrote the opinion in the *Marron* case, as one of the grounds upon which he fortified his conclusion as to the legality of this seizure, relied upon the provisions in Section 10, Title 2, of the National Prohibition Act. (41 St. 312, Sec. 8351i of Barnes Code 1924 Supp.; U. S. Comp. St. par. 10138½e.) See page 255.

That section provides:

> "No person shall manufacture, purchase for sale, sell or transport any liquor without making at the time a permanent record thereof, showing in detail the amount and kind of liquor manufactured, purchased, sold or transported together

with the names and addresses of the persons to whom sold, in case of sale, and the consignor and consignee in case of transportation, and the time and place of such manufacture, sale or transportation. The commissioner may prescribe the form of such record, which shall at all times be open to inspection, as in the act provided."

Section 34 of the same title, Comp. St. Ann. Supp., par. 10138½u, provides that the records required by Section 10, aforesaid "shall be subject to inspection at any reasonable time by the commissioner, or any of his agents, or by any public prosecutor, or by any person designated by him".

The opinion of the first *Marron* case continues as follows on page 255:

> "The gray ledger does not contain all of the information called for by section 10 of title 2 of the Prohibition Act, but it contains a more or less complete record of the liquor purchased, a record of the sales from day to day and in some cases the names of the purchasers. Such a book is not like the private papers of a citizen. It is subject to inspection by a number of persons, and the statute requires it to be kept as a permanent record. It is true that the gray ledger contains other matter in addition to that which the statute required to be kept, but a party who records his affairs in a book subject to inspection cannot complain of the consequent invasion of his privacy."

In the *Katz* case it was definitely held that the provisions of these sections respecting the keeping of records of the sales, etc., of intoxicating liquor was a requirement upon persons permitted to make the sales and not upon persons attempting to make

unlawful sales. After a review of various Federal cases concerning the interpretation to be given this section, Mr. Justice Stone concludes the opinion with this language:

> "We think the reasoning of these cases applicable here and that the words 'no person' in paragraph 10 refer to persons *authorized under other provisions of the act to carry on traffic in alcoholic liquors.*"

The United States Circuit Court of Appeals for the 2nd Circuit as recently as December 6, 1926, has had occasion to again consider its conclusions in the *Kirvin* case, in its decision in *United States v. Kirschenblatt,* reported in 16 Fed. Rep. 2d, page 202.

It is important to observe that the Court in the *Kirschenblatt* case not only considered the effect of its ruling in the *Kirvin* case but likewise took cognizance of the *Marron* case and the *Sayers* case. Thus it may be properly assumed that when the Court unanimously decided to support its conclusion in the *Kirvin* case it by implication refused to be persuaded by the doctrine adhered to by the United States Circuit Court of Appeals for the Ninth Circuit.

THE FACTS IN THE KIRSCHENBLATT CASE.

The matter came before the United States Circuit Court of Appeals in error to the District Court of the United States for the Southern District of New York.

Proceedings had been commenced by Jacob Kirschenblatt against the United States for the recovery

of certain papers seized under warrant by certain agents of the United States. An order was made by the District Court directing the return of the papers and the United States sued out the writ of error.

It appears that a Prohibition Agent obtained a search-warrant to search and seize a trunk alleged to have contained liquor which trunk was in the custody of the American Express Company. The affidavit recited that he had purchased certain whiskey from one Kirschenblatt in New York to ship him under an assumed name certain liquors in the trunk then in the possession of the express company. The trunk was seized and found to contain the liquor ordered. A few days later another Prohibition Agent secured a second warrant in order to search Kirschenblatt's offices. His affidavit recited the issuance of the first warrant, the seizure of the trunk and concluded with a request for a general search of the premises. Armed with the warrant a search was made and Kirschenblatt arrested. The agents seized a small amount of liquor and a number of Kirschenblatt's papers of various kinds. Kirschenblatt was indicted and instituted this proceeding for the recovery of the papers so seized and after a hearing in the District Court an order was made directing the return of all the papers following the decision in *Kirvin v. United States.*

The nature of the documents seized in the case does not appear from an examination of the decision but it does appear that the search-warrant did not particularly describe the seized papers but on the contrary only requested a general search of the premises.

The learned author of the opinion has so carefully digested the various conflicting decisions on the subject and has fortified the Court's position in the *Kirvin* case to such an extent that we deem it advisable to set forth the opinion at length.

> "The officers' entry under the warrant was lawful, the warrant itself being sufficiently supported by the affidavits. The arrest was also lawful, so that the question is of the officers' powers to search either under the warrant or as an incident to the arrest. The prosecution argues that the arrest gave the officers power to search the premises and seize, not only liquors and bottling apparatus, but any incriminatory papers which they found. That the search warrant did not go so far we understand to be agreed; at any rate, so much is plain. It is authorized only by section 25, tit. 2, of the National Prohibition Act (Comp. St. par. 10138½m), which described the property seizable as 'liquor, the containers thereof', and 'property designed for the manufacture of liquor'.
>
> While the last phrase may possibly not exclude all papers, it is plain, at least in a case like this, that the warrant would not justify the indiscriminate seizure of incriminatory documents. For this reason the argument runs that, since a person arrested may be searched, and all documents found upon him may be kept whatever their nature, and since the premises in which he is arrested may be searched for contraband as an incident to the arrest, the search so authorized must be as broad as the search of his person.
>
> It is true that the law has never distinguished between documents and other property found upon the person of one arrested. All may be used in the trial, so far as relevant. Baron v. U. S., 286 F. 822, 824 (C. C. A. 6); U. S. v. Kraus (D. C.) 270 F. 579; Dillon v O'Brien, 16 Cox, Cr. Cas. 245; People v. Chiagles, 237 N. Y. 193, 142 N. E. 583, 32 A. L. R. 676; Getchell v. Page, 103 Me. 387, 69 A. 624, 18 L. R. A. (N. S.) 253, 125

Am. St. Rep. 307; 1 Bishop, New Crim. Proc. par. 211. While the point was not involved, the language in Weeks v. U. S., 232 U. S. 383, 392, 34 S. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177, was broad enough to cover it.

Furthermore, the Supreme Court has very recently held that, upon an arrest, the immediate premises may be searched for contraband (Agnello v. U. S., 269 U. S. 20, 46 S. Ct. 4, 70 L. Ed. 145), just as a vehicle may be searched (Carroll v. U. S., 267 U. S. 132, 45 S. Ct. 280, 69 L. Ed. 543, 39 A. L. R. 790), and as officers, once in under a search-warrant, are not confined to the contraband specified in it (Steele v. U. S. (No. 1) 267 U. S. 498, 45 S. Ct. 414, 69 L. Ed. 757; U. S. v. Old Dominion Warehouse Co., 10 F. (2d) 736 (C. C. A. 2). This doctrine has been extended beyond contraband to incriminatory papers in two cases in the Ninth Circuit. Sayers v. U. S., 2 F. (2d) 146; Marron v. U. S., 8 F. (2d) 251.

Brady v. U. S., 300 F. 540 (C. C. A. 6), is put forward as another instance; but, so far as we can learn, the only evidence used against the defendants was contraband liquor.

While we agree that strict consistency might give to a search of the premises, incidental to arrest, the same scope as to a search of the person, it seems to us that that result would admit exactly the evils against which the Fourth Amendment is directed. Whatever the casuistry of border cases, it is broadly a totally different thing to search a man's pockets and use against him what they contain, from ransacking his house for everything which may incriminate him, once you have gained lawful entry, either by means of a search warrant or by his consent. The second is a practice which English-speaking peoples have thought intolerable for over a century and a half. It was against general warrants of search, whose origin was, or was thought to be, derived from Star Chamber, and which had been a pow-

erful weapon for suppressing political agitation, that the decisions were directed, of which Entick v. Carrington, 19 How. St. Trials, 1029, is most often cited. These cases were decided just after the colonists had been hotly aroused by the attempt to enforce customs duties by writs of assistance, and when within 30 years they framed the Fourth Amendment it was general warrants that they especially had in mind. Boyd v. U. S., 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746.

After arresting a man in his house, to rummage at will among his papers in search of whatever will convict him, appears to us to be indistinguishable from what might be done under a general warrant; indeed, the warrant would give more protection, for presumably it must be issued by a magistrate. True, by hypothesis the power would not exist, if the supposed offender were not found on the premises; but it is small consolation to know that one's papers are safe only so long as one is not at home. Such constitutional limitations arise from grievances, real or fancied, which their makers have suffered, and should go pari passu with the supposed evil. They withstand the winds of logic by the depth and toughness of their roots in the past. Nor should we forget that what seems fair enough against a squalid huckster of bad liquor may take on a very different face, if used by a government determined to suppress political opposition under the guise of sedition.

It is likely that the admitted power to seize the fruits, or the tools, of crime, itself rests upon a very ancient basis. People v. Chiagles, 237 N. Y. 193, 196, 142 N. E. 583, 32 A. L. R. 676. At any rate, it is carefully circumscribed in the Search Warrant Act (Comp. St. par. 10496½a et seq.) itself. The pursuit of a thief on hue and cry was a civil as well as criminal remedy, and the captors retook the booty and in early times themselves did execution; the tool or other object which killed a man was deodand and forfeit; a

burglar's kit or a counterfeiter's plate have never been property in the ordinary sense, any more than liquor since the enactment of section 25. Ruder times have ruder remedies, but the power to seize such chattels probably descends from notions which have long since lost their rational foundation, and, while the method has changed, the substance remains.

While the point has never been decided, the language of the Supreme Court accords with our belief that it is only such things that may be seized as an incident to an arrest. Thus, in Carroll v. U. S., 267 U. S. 132, 158, 45 S. Ct. 280, 287 (69 L. Ed. 543, 39 A. L. R. 790), the power was expressed as extending to things 'which it is unlawful for him to have and which may be used to prove the offense'. In Agnello v. U. S., 269 U. S. 20, 30, 46 S. Ct. 4, 5 (70 L. Ed. 145) the phrase is: 'Things connected with the crime as its fruits, or as the means by which it was committed, as well as weapons and other things to effect an escape from custody'. In Gouled v. U. S., 255 U. S. 298, 309, 41 S. Ct. 261, 265 (65 L. Ed. 647) the language is: 'They'—search warrants—'may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding.' It is true that the last case did not involve an arrest, but the language scarcely admits of limitation on that account.

The real difficulty in the case at bar appears to us to be in the application of the last doctrine, because it is apparent that a paper may be itself the very thing against which the law is directed. U. S. v. Welsh, (D. C.) 247 F. 239, affirmed 267 F. 819 (C. C. A. 2); Search Warrant Act, par. 2, subd. 3 (Comp. St. par. 10496½b). As was said in Gouled v. U. S., papers as such have no sanctity, and may be seized, like any other property, if they offend. Courts have at times extended the doctrine to papers, not actually part

of the criminal act, but necessary to the conduct of the venture as a whole. Dillon v. O'Brien, 16 Cox, Cr. Cas. 245; State v. Mausert, 88 N. J. Law, 286, 95 A. 991, L. R. A. 1916C, 1014; Swan v. U. S., 54 App. D. C. 100, 295 F. 921; Marron v. U. S., 9 Fed. (2d) 251 (C. C. A. 9). Yet, if all records of the offender's doings, such as account books or customers' lists, are to be included, there would seem to be no escape from allowing a search at large through all his papers.

It is seldom that one finds a document containing evidence of crime which was not at one time used in its commission; the papers important in any prosecution are ordinarily either communications passing between the actors or records necessary to keep track of the details. These are all that the prosecution requires, and all that, except in rare instances, it will ever get. They cannot be reached, except by a thorough search of all that the offender has, to allow which would be to countenance exactly what the amendment was designed to prevent. Therefore, while we agree that it is no answer to a search to say that papers have been seized, we cannot agree that the power extends beyond those which are a part of the forbidden act itself. It would be hazardous to attempt any definition; we shall not.

The forged note, the fraudulent prospectus, the policy slip, the written contract, if that be forbidden, the seditious broadside—perhaps all these may be contraband and subject to seizure when found on the premises. But the whole of a man's correspondence, his books of account, the record of his business, in general, the sum of his documentary property—these, in our judgment, are as inviolate upon his arrest as they certainly are upon search warrant. It is enough in the case at bar to say that the record shows no papers seized which fall within the exception.

Order affirmed."

VEEDER v. UNITED STATES, 252 FED. REP. PAGE 414, DECIDED BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT SUPPORTS THE CONCLUSIONS ARRIVED AT BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT IN KIRVIN v. UNITED STATES.

Veeder v. United States, supra, has definitely decided this important proposition of law in such a manner that it is difficult to ascertain how the confusion has resulted in the conflicting decisions which we have examined thus far in this brief.

Certainly the legal proposition here involved was in that case squarely presented to that Court and its conclusions have successfully withstood assault up to the present day.

In that case it appeared that an examiner of the Federal Trade Commission made an affidavit for the purpose of securing a search-warrant under Title II of the Act of June 15, 1917 (40 Stat. 228, c30). Briefly stated the affidavit recited that the affiant had made a partial examination of the various private papers, records, documents and memoranda in the possession of and owned by Veeder which affiant had good reason to believe had been used in the commission of various felonies in connection with the alteration of the books of certain corporations. A comprehensive enumeration of the various books and memoranda, etc., were referred to. The search-warrant was issued and Veeder sued out a writ of error to the United States Circuit Court of Appeals and challenged the sufficiency of the affidavit and the deposition upon which the search-warrant was issued. The Circuit Court gave expression to the basic funda-

mental principles inherent in our form of government with respect to the forcible invasion of a man's home and the violation of his constitutional rights by agents of the United States Government in their quest for evidence of crime. It discussed in its decision the failure of the affiant to set forth positively the facts alleged in the affidavit and noted further its deficiency in many other respects.

More important, however, was its decision with respect to the nature and character of the various papers, documents and memoranda referred to in the affidavit as the means and instruments in the commission of the felonies set forth therein. At page 418 the Court said:

> *"No search warrant should be broader than the justifying basis of facts. For example, if a murder has been committed by means of a shot from a gun and by no other means, the search-warrant should not direct the officer to enter the accused's home and seize the family register of births and deaths. And as the serving officer has no discretion in executing the search warrant in its entirety, the householder is entitled to have the search-warrant quashed.*
>
> *It is not every kind of property that may be seized under a search-warrant. Limited by McIsaac's accusation, the statute applies only to property that 'was used as the means of committing a felony'. By exclusion, therefore, papers and documents which afford evidence that a felony has been committed, but which were not the means of committing it, are immune from seizure."*

We repeat at the expense of being prolix that neither the "gray ledger" in the instant case nor the other private documents and memoranda seized by

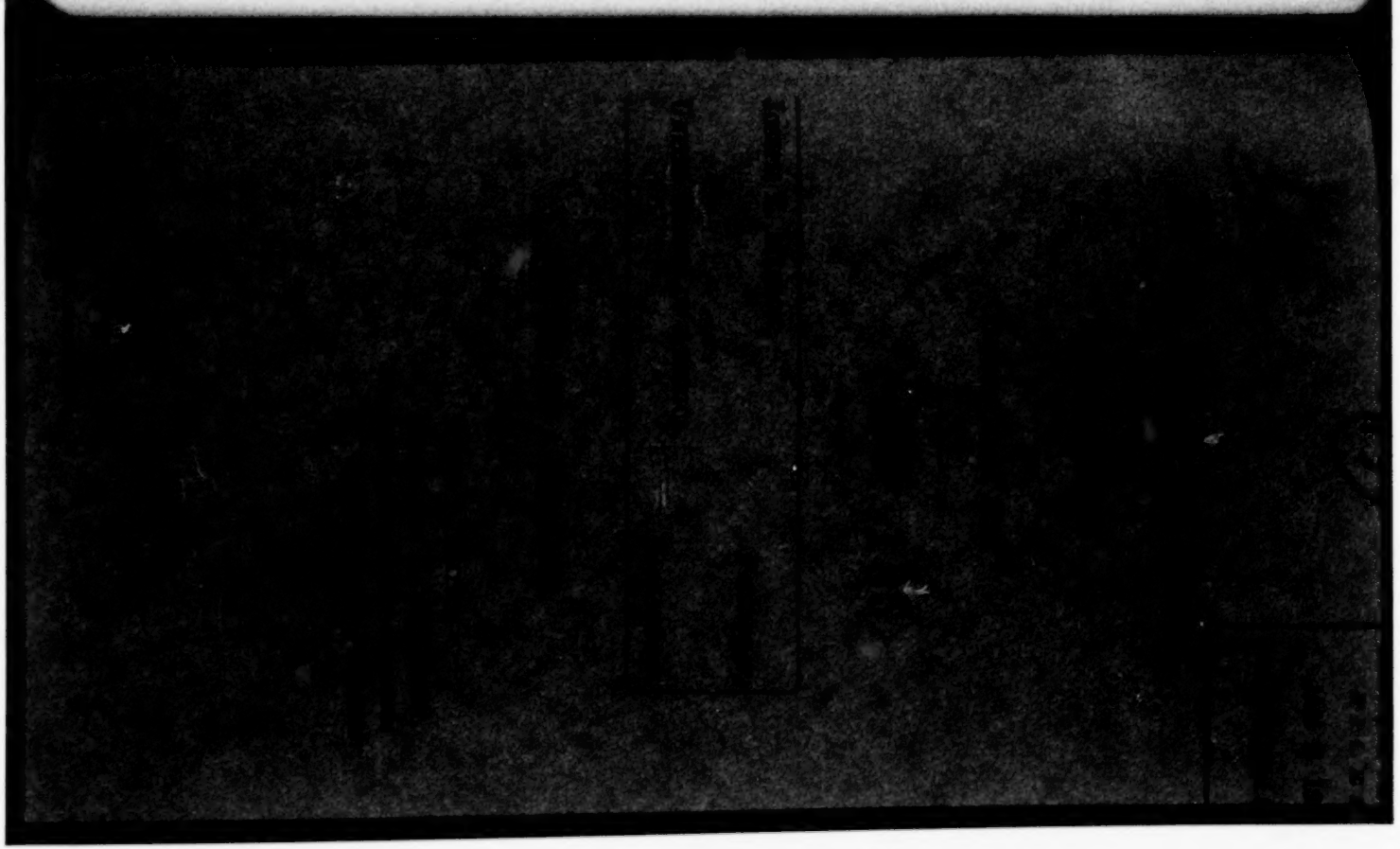
the agents at the time were the means of committing the crime as alleged in the indictment although they may have afforded evidence that such a crime had been committed. And in making such a statement it is to be remembered that not a single document, paper or memorandum was so much as remotely referred to in the application for the search-warrant or in the warrant itself.

CONCLUSION.

From the inception of this case counsel for Marron have conscientiously and honestly believed that his constitutional rights have been violated and every step taken by him throughout the entire controversy has been taken in the highest of good faith, fortified by an abiding conviction that the Highest Court in this country will recognize and preserve these rights and that by its decision in this case remove for all time the possibility of further injury to its citizens as must result if the decisions of the United States Circuit Court of Appeals for the Ninth Circuit be permitted to stand.

Dated, San Francisco,
August 27, 1927.

Respectfully submitted,
BENJAMIN L. MCKINLEY,
Attorney for Petitioner.



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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1926

No. 930

JOSEPH E. MARRON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A REHEARING.

To the Honorable William Howard Taft, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The petitioner herein with the utmost respect and deference to this Honorable Court respectfully requests that the decision heretofore and on the 21st day of November, 1927 rendered by this Court be set aside for the reasons hereinafter set forth and that the contentions of the petitioner heretofore briefed and presented by oral argument be reconsidered.

PART ONE.

AN EXAMINATION OF THE DECISION OF THIS HONORABLE COURT, MARRON v. UNITED STATES, UNITED STATES SUPREME COURT, ADVANCE OPINIONS, DECEMBER 1, 1927; 70 Law. Ed. page 45, DISCLOSES TWO FUNDAMENTAL PROPOSITIONS OF LAW, AS APPLIED TO THE FACTS, THAT ARE NOT ONLY INCONSISTENT BUT CONFLICT WITH WELL ESTABLISHED PRECEDENTS OF THIS HONORABLE COURT.

From the inception of this case the Government has consistently taken the position not only before the trial Court but likewise before the United States Circuit Court of Appeals for the Ninth Circuit that the seizure of the ledger and other documents was justifiable as an incident to the execution of the search-warrant in question.

The Government vigorously asserted the merit of this contention during the oral argument of this case before this Honorable Court and bottomed its position upon the authority of *Adams v. New York,* 192 U. S. 585.

Petitioner did with equal vigor combat the position of the Government in this respect and as the opinion of this Court discloses did so successfully.

With equal force this Court decided that the constitutional rights as evidenced by the fourth article of the amendment of the Constitution of the United States had been violated by the seizure of these various documents for the reason that they had not been particularly described as things to be seized in the warrant.

We propose to show that the decision of this Honorable Court should have gone no further; that it ex-

pressed a correct statement of the law as applied to the facts and correctly interpreted the constitutional amendment of the United States of America but that when this Court went further in its decision and decided the seizure of these various documents was justifiable as an incident to the right of the search arising from the arrest of Birdsall while in charge of the premises it permitted itself to fall into error that should not be permitted to remain upon the pages of its decisions.

PART TWO.

AN EXAMINATION OF THE MARRON DECISION.

Petitioner has with care carefully read and digested the opinion of this Court speaking thru Mr. Justice Butler; obviously such an important proposition of law should not be susceptible of two constructions but we are constrained to assert that this opinion discloses such a condition.

The constitutional rights and guarantees of this petitioner have either been protected or violated by the facts as disclosed by the record; this may apear to be a truism but as we shall point out hereafter it appears in this decision that these rights and guarantees were violated on the one hand and protected on the other.

We believe that in the entire history of this Honorable Court such a condition has never been permitted to exist for when this Court has ascertained that these guarantees under the constitution have been violated, it has never sought to determine that if protected in

the one instance that the weight of such protection should be set off against the weight of violation and if protection should out-weigh violation to withhold from a defendant the safe-guards of the constitution.

This assertion is not idly made but finds support in the language of the opinion.

Let us examine the opinion in the light of this statement.

The position of the petitioner stripped of all adornment of legal facts and phases is that the ledger and other documents were not described in the warrant as things to be seized and that as he was not arrested with them upon his person nor present when the seizure was made, such a seizure violated the fourth amendment.

Mr. Justice Butler in the disposition of this proposition thus simply stated divides the legal propositions involved into two premises:

(a) That the seizure was justifiable as an incident to the execution of the search-warrant;

(b) That the seizure was justifiable as an incident to the right of search arising from the arrest of Birdsall, a co-defendant, while in charge of the premises.

Mr. Justice Butler speaking for this Honorable Court decided that the seizure was not justifiable as an incident to the execution of the search-warrant primarily because the ledger and other documents were not particularly described as things to be seized. By virtue of what authority did this Court rely upon in thus deciding this cause? The answer is apparent

*that the constitutional rights of Marron under the fourth and fifth amendments to the Constitution of the United States had been violated because the warrant had not particularly described * * * the things to be seized.*

We find, therefore, that this Court has sustained the position of the petitioner throughout this case and we find further that it has unqualifyingly pronounced its judgment that the constitutional rights of Marron had been violated.

Further argument and further citation of authority would be a work of supererogation.

After having devoted over three quarters of the decision sustaining this position this Honorable Court in the concluding paragraph of the decision states a proposition of *court-made law unsupported by authority* and uses it as an off-set against a violation of the Constitution of the United States.

The concluding paragraph of the opinion above referred to decides that Birdsall at the time of the seizure of the private documents and books of Marron was actually engaged in a conspiracy in maintaining a common nuisance; that a crime was being committed in the presence of arresting officers; that Birdsall was lawfully arrested and that consequently they had a right without a warrant to search the place in order to find and seize things used to carry on the criminal enterprise. That the ledger was a part of the outfit or equipment actually used to commit the offense and that consequently the seizure was valid as an incident to a lawful arrest upon the premises. These state-

ments coming in the opinion as they do immediately after this language:

> *And it is clear that the seizure of the ledger and bills, in the case now under consideration, was not authorized by the warrant. C. F. Kirvin v. United States,* 5 F. (2d) 282, 285; *United States v. Kirchenblatt,* 16 F. (2d) 202; *Steele v. United States,* 267 U. S. 498.

When the agents of the United States entered these premises with the warrant the record disclosed that the only defendant present was Birdsall; that Birdsall was arrested and charged with a violation of the National Prohibition Act; subsequently and after the Government had had an opportunity to *rummage thru and examine the private books and documents that it had seized and which belonged to the petitioner and which this Court had decided was seized in violation of his constitutional rights,* an indictment was returned by the grand jury against Marron, Birdsall and others charging them with a felony, to-wit: criminal conspiracy.

The affidavit upon which the search-warrant was issued (Trans. pp. 55-57) discloses that the crime complained of as having been committed at those premises consisted in the illegal sale and possession of intoxicating liquor in violation of the National Prohibition Act; *it was not averred in the affidavit that the crime of conspiracy was being committed in the premises.*

So that up to the time that the Government examined these private documents of Marron in the security of its own offices *and investigated the things suggested by the entries contained therein by and thru its vari-*

ous agencies, i. e., Intelligence Unit, Dept. of Justice, District Attorney's office and the entire Prohibition Department the crime of conspiracy appears nowhere in the record of this case.

Consequently can it be said with any degree of accuracy that Marron (or Birdsall were known to have been connected with the crime of conspiracy) prior to the seizure and examination of his private records; so much for the statement that a conspiracy was being committed in the presence of these arresting officers.

Was the ledger and the other documents the means of committing this alleged conspiracy or stating the proposition in the language of this Honorable Court:

> "And, if the ledger was not as essential to the maintenance of the establishment as were bottles, liquors and glasses, it was none the less a part of the outfit or equipment actually used to commit the offense."

Petitioner emphatically insists that in the light of reason and in the light of the adjudication of *Gouled v. United States,* 255 U. S. 298 the ledger and other documents were not the means of committing this conspiracy but on the contrary were evidential only of the fact, if it so existed.

They may have afforded evidence that a crime had been committed; they may have been indicative that a crime had been committed; they may have proved that a crime had been committed but they were not the means or instruments of crime.

In support of this position the petitioner in the briefs heretofore filed in this Court and likewise upon

the oral argument of the case relied upon *Gouled v. United States,* 225 U. S. 298 in support of this very contention namely: that these documents and private papers were not the means or instruments in the commission of the crime but on the contrary were evidential only that a crime had been committed.

It is worthy of comment in passing to state that the *Gouled* case is not discussed, distinguished or even referred to in the opinion, although that case discusses the very point here involved and distinguishes between private books and papers of account as the means or instruments of crime and their aspect as evidential value only that a crime had been committed.

In consideration of the importance attached by petitioner to the conclusions arrived at by this Honorable Court in the *Gouled* case we deem it advisable and likewise necessary to set forth again the facts and the law.

Briefly stated, the facts were that the plaintiff in error Gouled, one Vaughan and an attorney at law were charged with being parties to a conspiracy to defraud the United States in violation of Section 37 of the Federal Criminal Code, and in the second Count in the indictment were charged with having used the mails to promote a scheme to defraud the United States in violation of Section 215 of the Code. Gouled was convicted.

The first two questions concerned the admission in evidence of a paper surreptitiously taken from the office of Gouled by officers of the Intelligence Department of the army. With this feature of the case,

namely, the surreptitious and furtive taking of a man's papers, we have no concern.

The remaining four questions, however, related to papers taken from the defendant's office *under two valid search-warrants,* and it is with these questions that we are vitally concerned.

The *Gouled* case, therefore, may be definitely segregated and construed as establishing two propositions, namely (firstly), surreptitious and furtive taking of a man's private documents; and (secondly) the seizing of them *under a valid search-warrant.*

The private documents of Gouled, seized under the search-warrant, consisted of an unexecuted form of contract between him and one Lavinsky; a written contract executed by the defendant and one Steinthal, and the third a bill for disbursements and professional services rendered by an attorney at law for and on behalf of Gouled. These various documents were alleged in the petition upon which the search-warrant was issued, to have been used in the commission of a felony, to-wit, the bribery of an officer of the United States; it was further alleged in another affidavit that Gouled had at his office certain letters, papers and documents and writings which were related to and had been used in the commission of a felony, to-wit, conspiracy to defraud the United States, upon which charge the defendant Gouled was before the Court.

Subsequent to the seizure of these papers, an indictment was returned and prior to the trial a motion was made on behalf of Gouled for the return of the papers

seized under the search-warrant, which motion was denied.

A duplicate original of the Steinthal contract and the original Lavinsky contract, together with the bill for attorney's fees, were offered and admitted into evidence over the constitutional objections of Gouled, to-wit, the violation of his rights under the Fourth and Fifth Amendments.

Mr. Justice Clark, in his conclusion, made plain the distinction between a search for stolen and forfeited property, counterfeit coins, burglar tools, weapons, implements of gambling and other things of like character. Unquestionably these things were enumerated expressly in the opinion to emphasize the distinction between them and the private books, writings and documents of a citizen, and he likewise was careful to preserve the rights of seizure under search-warrants of private papers, but he added:

> "*they may be resorted to only when the primary right of such search and seizure may be found in the interest which the public or complainant may have in the property to be seized,* but not the right to the possession of it, or where the valid exercise of the police power renders possession of the property by the accused unlawful, and provides that it may be taken. (Boyd v. United States.)"
>
> "There is no special sanctity in papers as distinguished from other property to render them immune from search and seizure *if only they fall within the scope of the purpose of the cases in which other property may be seized and if they be adequately described in the affidavit and warrant.*"

The third question certified for consideration is, in the language of the opinion, as follows:

> "Are papers of no pecuniary value, but possessing evidential value against persons presently suspected and subsequently indicted under Secs. 37 and 215 of the United States Criminal Code when taken under search warrants issued pursuant to the Act of June 15th, 1917, from the house or office of the person suspected,—seized and taken in violation of the 4th Amendment?

That the papers involved are of no pecuniary value is of no significance. Many papers, having no pecuniary value to others, are of the greatest possible value to the owners, and the property of a most important character. (Boyd Case, 116 U. S. 627, 628, 29 L. Ed. 749, 750, 6 Sup. Ct. Rep. 524); and since those here involved possessed 'evidential value' against the defendant, we must assume that they were relevant to the issue.

Restraining the questions to the papers described, and first, as to the unexecuted form of contract with Lavinsky, a stranger to the indictment. While the contents of this paper are not given, it is impossible to see how the government could have such an interest in such a paper that, under the principles of law stated, it would have the right to take it into its possession to prevent injury to the public from its use. The government could desire its possession only to use it as evidence against the defendant, and to search for and seize it for such purpose was unlawful.

Likewise the public could be interested in the bill of the attorney for legal services only to the extent that it might be used as evidence, and the seizure of this also was unlawful.

As to the contract with Steinthal, also a stranger to the indictment: *It is not difficult, as we have said, to imagine how an executed written contract might be an important agency or instrumentality, in the bribing of a public servant, and in per-*

> *petrating frauds upon the government, so that it would have a legitimate and important interest in seizing such a paper in order to prevent further frauds upon the government, but the facts necessary to give this contract such a character do not appear in the certificate.* On the contrary, this third question recites that the papers are all of no pecuniary, but are of evidential value, and in the sixth question it is recited that they are 'of evidential value only', so that it is impossible to say, on the record before us, that the government had any interest in it other than an evidence against the accused; and therefore, as to all three papers, the answer to the question must be in the affirmative."

As stated the private documents of Gouled were more damaging in character, kind and degree than the documents seized in the instant case for the reasons that the documents themselves were the actual instruments used in the perpetration of the alleged conspiracy; the alleged conspiracy could never have been consummated if the contracts referred to in that decision had not been drawn to express the intent of the alleged conspirators for we are entitled to assume that were this conspiracy not expressed in the form of these contracts the conspiracy itself would have reposed only in the bosoms of the co-conspirators.

When the contracts were drawn to set forth the propositions of conspiracy the very paper upon which they were drawn then and there became the very instrumentality by which the alleged conspiracy could have been perpetrated.

This Court, however, in declaring the seizure unlawful and speaking through Mr. Justice Clark con-

cluded that these various documents possessed evidential value only and consequently could not be seized nor subsequently admitted into evidence.

What distinction, if any exists between the documents in the Gouled case and the documents in the Marron case? No one thus far has questioned the correctness of the doctrine enunciated in the *Gouled* case but on the contrary it has been referred to and affirmed, upon frequent occasions. It is no answer to the proposition to assert that each case stands and falls upon its own particular and peculiar facts and that therefore, we must consider the type of private documents and memoranda in the Marron case and in the *Gouled* case; fundamentally the documents in each case were the private and personal property of the accused and contained as they did evidence of crime only.

Kirvin v U. S., 5 F. (2nd) 282;
U. S. v. Kirchenblatt, 16 F. (2nd) 202;
Petition of Barber, 281 F. 550;
U. S. v. Hills, 263 F. 812.

THE OPINION IN THE MARRON CASE DOES NOT DISPOSE OF THE PETITIONER'S CONTENTION THAT HIS CONSTITUTIONAL RIGHTS UNDER THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES WERE VIOLATED.

The opinion is silent upon this question.

The ledger and other documents were admitted into evidence over objections and testimony of various witnesses were given at length as to the contents and

as to the authenticity of the documents. Marron was the unwilling source of evidence and was in effect compelled to be a witness against himself in a criminal case in violation of the express provisions of Article V of the amendment to the Constitution of the United States just as effectively as though he were compelled by the Government to take the witness stand and to be then and there interrogated before the Court and jury.

There may be for certain purposes an inter-relation between the fourth and fifth amendments in so far as the right of a person accused of a crime are concerned, but there is nevertheless a separate and distinct line of demarcation between them so that a justification under one does not afford an excuse for a violation under the other.

We are not compelled to go far afield in search of authority to support this contention for we find a complete answer to it in *Gouled v. United States* as follows at page 311:

> "If such papers, so taken, are admitted in evidence against the person from whose house or office they were taken, such person being then on trial for the crime for which he was accused in the affidavit for warrant,—is such admission in evidence a violation of the Fifth Amendment?
>
> The same papers being involved, the answer to this question must be in the affirmative; for, they having been seized in an unconstitutional search, to permit them to be used to evidence would be, in effect, as ruled in the Boyd case to compel the defendant to become a witness against himself."

The next question in order for consideration related to the violation of the defendant's rights under the

Fifth Amendment by the subsequent admission of the seized documents into evidence, and in the language of the opinion.

The fifth question reads:

> "If, in the affidavit for search warrant under Act of June 15, 1927, the party whose premises are to be searched be charged with one crime, and property be taken under the warrant issued thereon, can such property so seized be introduced in evidence against said party when on trial for a different offense?
>
> It has never been required that a criminal prosecution should be pending against a person in order to justify search for and seizure of this property under a proper warrant, if a case of crime having been committed and of probable cause is made out, sufficient to satisfy the law and the officer having authority to issue it, and we see no reason why property seized under a valid search warrant, when thus lawful obtained by the government, may not be used in the prosecution of a suspected person for a crime other than that which may have been described in the affidavit as having been committed by him. *The question assumes that the property seized was obtained on a search warrant sufficient in form to satisfy the law;* and if the papers to which the question refers had been of a character to be thus to use them to prove any crime against the accused as to which they constituted relevant evidence."

We most respectfully petition that the court grant a rehearing so that petitioner may present further argument in support of his contention that his constitutional rights under the Fourth and Fifth Amendments to the Constitution of the United States were violated by the reception into evidence, over objec-

tions, of his private books of account and other private documents.

CONCLUSION.

Supported as we confidently feel we are by the record, we respectfully pray that a rehearing be granted.

Dated, San Francisco,
December 24, 1927.

Respectfully submitted,
HUGH L. SMITH,
BENJAMIN L. MCKINLEY,
Attorneys for Petitioner.

CERTIFICATE OF COUNSEL.

The undersigned does hereby certify that the foregoing petition for a rehearing is well founded in point of law as well as in fact and is presented in good faith and that it is not interposed for delay.

Dated, San Francisco,
December 24, 1927.

HUGH L. SMITH,
Attorney for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 930

JOSEPH E. MARRON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS OF THE COURTS BELOW

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals, not yet reported, is given in the record, pp. 535–540.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 13, 1926. (R. 540.) A petition for rehearing, seasonably filed and entertained, was denied January 31, 1927. (R. 541–542.) Petition for certiorari was filed February 24, 1927. Jurisdiction to issue the writ is conferred by Sec-

tion 240 (a), Judicial Code, as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 936).

QUESTIONS PRESENTED

The questions presented by this case are:

1. Were petitioner's constitutional rights as guaranteed by the Fourth and Fifth Amendments violated by the seizure, in connection with a search, seizure, and arrest, of a certain ledger and other papers and their introduction in evidence?

2. Was the testimony given by the witness Neilsen erroneously allowed in evidence, and did the instructions of the trial court pertaining thereto amount to prejudicial error?

STATEMENT OF THE CASE

Petitioner, with six others, was indicted in the District Court for the Northern District of California for conspiracy, under Section 37 of the Penal Code, to violate the National Prohibition Act by manufacturing, selling, transporting, furnishing, delivering, and possessing intoxicating liquor, and by maintaining a common nuisance by keeping for sale and selling intoxicating liquor at 1249 Polk Street, in San Francisco. (R. 3–50.)

The evidence offered by the Government centered around a saloon at 1249 Polk Street, which petitioner took over in September, 1923, from codefendant Brand, to whom he had previously loaned money to buy the business. (R. 166–168.) Petitioner continued to be the lessee and was active in

the business until the place was raided in October, 1924 (R. 90), although he and codefendant Birdsall denied petitioner's connection therewith. (R. 107, 230–232.)

While Birdsall was brought in to take charge of the saloon (R. 168), and codefendant Mahoney employed to help there (R. 150, 209), petitioner was often seen in the place and sometimes sold liquor to the customers. (R. 164, 204, 207–208, 220, 229.) He paid the rent (R. 156–157), and the telephone was listed in his name (R. 160). Water bills were sent to him (R. 192), and bills for furniture, telephone, electric light, and water made out to him were found on the premises during the raid. (R. 104, 107–108, 110.) During the period of the alleged conspiracy petitioner also made arrangements with one Neilsen to replenish his supply of liquors by bringing in liquor from rum ships in the harbor. These loads were delivered to petitioner at the dock and some time thereafter Neilsen would call at 1249 Polk Street, where he was paid for his services by petitioner. (R. 234–241.)

On October 2, 1924, the place was raided by prohibition agents (R. 90), and Birdsall, who was found in charge, was arrested (R. 98, 100). This raid was made pursuant to a valid search warrant authorizing a search of all parts of the premises for, and seizure of, intoxicating liquor and paraphernalia used in its manufacture. (R. 65–69.)

A considerable quantity of intoxicating liquor was seized (R. 75–76), and in addition thereto a book (R. 94, 98), referred to as a "gray ledger," and gas, electric, water, telephone, and furniture bills (R. 103). The ledger contained a record of the business carried on by both Brand and petitioner and showed inventories of liquors, gross receipts and expenses, including various gifts made to Police Officers Kissane and Gorham, who were indicted as coconspirators. (R. 126–131, 144–146.) A handwriting expert testified that ninety per cent of the entries in the ledger beginning with page 34 were made by petitioner. (R. 264–265, 285–286.) In the ledger were also found several loose slips of paper with items of account thereon (R. 113–115) in the handwriting of Birdsall and the auditor employed to make up statements from the ledger as to profits realized (R. 276–283, 143, 152). These papers with the ledger and the bills above referred to constitute the documentary evidence in the case.

The search was strictly within the terms of the warrant. There was no general search for incriminating documents. Those seized came under observation during a *bona fide* search for contraband. The ledger was on a shelf in a closet where a quantity of champagne was found in a trap under the floor. (R. 118, 126.) The bills were beside a cash register in the kitchen where a quantity of liquor was seized. (R. 107, 117.)

No objection was made to the seizure of the liquors under the warrant, but before trial peti-

tions were filed for the return of the ledger and other papers seized and to suppress their use in evidence, on the grounds that the affidavit and the search warrant on which it was based did not mention or describe any papers to be seized, but called for the search for and seizure of liquors and paraphernalia for their manufacture; that the ledger and other papers seized were not the instruments or fruits of crime, but were the private papers and property of petitioner; that so far as the taking of these documents was concerned the officers were unlawfully upon the property and were trespassers; that the papers were not taken from the person of petitioner, but from the premises described in the warrant; that no return was made of the papers seized nor was any receipt left therefor; and that the seizure of the papers was in violation of the Fourth Amendment and to introduce them in evidence would deprive petitioner of his rights under the Fifth Amendment. (R. 51–76.) The petitions were denied. (R. 77–78.) Objections to the introduction of the papers in evidence were made during the trial on the same grounds and were overruled. (R. 95–98, 102–103.)

Petitioner was twice tried. The first trial resulted in his conviction and that of four of his codefendants. On writs of error sued out by petitioner and three other defendants the conviction was reversed as to petitioner, because of the erroneous admission of evidence relating to liquor unlawfully seized from petitioner at 3047 California

Street and 2922 Sacramento Street, San Francisco. The seizure and admission in evidence of the ledger here complained of, after a thorough consideration of the law on the subject, was held proper. *Marron* v. *United States,* 8 F. (2d) 251.

On retrial petitioner was again convicted (R. 84) and was sentenced to two years in the Leavenworth Penitentiary and to pay a fine of $10,000 (R. 88–89). The conviction was affirmed by the Circuit Court of Appeals (R. 540), the court holding that its former decision on the admissibility of the documents in question had become the law of the case (R. 536–537).

ARGUMENT

I

THE SEIZURE OF PETITIONER'S LEDGER AND PAPERS AND THEIR INTRODUCTION IN EVIDENCE DID NOT VIOLATE THE FOURTH AND FIFTH AMENDMENTS

When the officers entered the saloon under a valid warrant for the search of contraband liquor they found Birdsall, petitioner's coconspirator, in charge. He was then actually engaged in the commission of a misdemeanor by possessing intoxicating liquor for beverage purposes and by maintaining a nuisance where such liquors were kept for sale. The officers had sufficient grounds to know that he was committing such offenses in their presence. He was in fact arrested. (R. 98, 124, 125.) As an incident to the lawful arrest the officers had

the right to search the immediate premises for fruits of the crime and the means by which it was committed (*Agnello* v. *United States,* 269 U. S. 20), and to seize evidentiary papers which were merely incidentally discovered during such search. In *Sayers* v. *United States,* 2 F. (2d) 146, relied on by the court below, it was said (p. 147):

> A lawfully arrested person may be searched for instruments, fruits, and evidences of the crime; and, if taken in commission of the crime in a building, the latter may be likewise searched to the extent that the offender's control and activities likely extended. This is the law since the Fourth Amendment, even as it was law before it, is reasonable, and is not within the amendment's ban upon unreasonable searches and seizures. * * *
>
> In any such search, not only may the instruments and fruits of crime be seized, but mere evidentiary articles, including papers incidentally discovered, may be likewise seized.

In *Smith* v. *Jerome,* 93 N. Y. Supp. 202, the officers searched the room in which defendant was arrested and found and seized certain incriminating letters. The court, in denying a motion for their return, said (p. 202):

> The police have the power and it is also their duty to search the person of one lawfully arrested, and also the room or place in which he is arrested, and also any other place to which they can get lawful access, for ar-

> ticles that may be used in evidence to prove the charge on which he is arrested. We have no statute defining this power or prescribing this duty, but the ends of justice require that they should exist, and they have been exercised under the common law from time immemorial.

The language of the court in *State* v. *Mausert*, 88 N. J. L. 286, is applicable here. There the defendant, convicted of keeping a disorderly house, was arrested in the office of his hotel under a warrant and at the time of the arrest the officer seized the hotel register and cashbook which were on a near-by counter. The court, in holding that these books were properly seized and admitted in evidence against the defendant, said (p. 290):

> These books were in actual use as a means of carrying on the unlawful business, and were as much in defendant's possession and under his control when arrested as if he had them under his arm and dropped them to the floor. It is not a case where papers were secreted and intended to be kept private, nor of requiring the production of papers of like character, but rather the taking of evidence of a crime then being committed, in the commission of which the books were a useful element. There was no unreasonable search and seizure of incriminating evidence within the constitutional prohibition.

There is a recent decision on this subject, not referred to by petitioner, by the Circuit Court of Appeals for the Second Circuit, in *United States* v.

Kirschenblatt, 16 F. (2d) 202. There a warrant, as in the instant case, directed the search of premises for, and seizure of, liquor and property designed for its manufacture. The premises, consisting of offices, were entered under the warrant, the defendant was arrested in the offices, and a small amount of liquor was seized, together with a number of defendant's papers of various kinds. The Circuit Court of Appeals said that the officers' entry under the warrant and the arrest were lawful, and the question presented was the extent of the officers' authority to search and seize under the warrant, or as an incident to the arrest—that is, whether the arrest gave the officers power to ransack the premises and seize not only liquors and bottling apparatus but any incriminating papers. The court held that the warrant, which made no mention of papers, would not justify an indiscriminate seizure of incriminating documents and, with respect to the seizure as an incident to the arrest, the court drew a distinction between papers found upon the person arrested, which it held may be used in the trial so far as relevant, and papers found upon the premises of one arrested where such papers constituted merely incriminating evidence and did not fall within the class of contraband property, such as forged notes, fraudulent prospectuses, and policy slips. The court held that the papers seized did not fall within the latter class and it affirmed the decision of the District Court ordering their return.

In that case the record showed that the agents ransacked defendant's entire premises and rummaged all through his private papers for incriminating evidence, for in the course of its opinion the Circuit Court of Appeals said (p. 203):

> While we agree that strict consistency might give to a search of the premises, incidental to arrest, the same scope as to a search of the person, it seems to us that that result would admit exactly the evils against which the Fourth Amendment is directed. Whatever the casuistry of border cases, it is broadly a totally different thing to search a man's pockets and use against him what they contain, *from ransacking his house for everything which may incriminate him,* once you have gained lawful entry, either by means of a search warrant or by his consent. * * *
>
> After arresting a man in his house, *to rummage at will among his papers in search of whatever will convict him,* appears to us to be indistinguishable from what might be done under a general warrant; indeed, the warrant would give more protection, for presumably it must be issued by a magistrate. (Italics ours.)

After pointing out that papers necessary to a criminal venture may be seized, the court proceeded (p. 204):

> Yet, if all records of the offender's doings, such as account books or customers' lists, are to be included, there would seem to be no

escape from allowing a search at large through all his papers.

It is seldom that one finds a document containing evidence of crime which was not at one time used in its commission; the papers important in any prosecution are ordinarily either communications passing between the actors or records necessary to keep track of the details. These are all that the prosecution requires, and all that, except in rare instances, it will ever get. They cannot be reached, *except by a thorough search of all that the offender has,* to allow which would be to countenance exactly what the amendment was designed to prevent. * * *

The forged note, the fraudulent prospectus, the policy slip, the written contract, if that be forbidden, the seditious broadside—perhaps all these may be contraband and subject to seizure when found on the premises. But the whole of a man's correspondence, his books of account, the record of his business, in general, the sum of his documentary property—these, in our judgment, are as inviolate upon his arrest as they certainly are upon search warrant. (Italics ours.)

There are statements in that opinion which indicate that the court believed that the only incriminating papers (not contraband or instruments of the crime) which may be seized as incident to a lawful arrest are those found on the person of the man arrested, but the record in that case showed that

to disclose the incriminating documents the officers ransacked the premises in a high-handed way, not to discover contraband articles described in the warrant but merely to obtain incriminating documents, and it was for this reason that the United States made no application for certiorari to review that decision.

There was in the instant case no rummaging among defendant's papers for incriminating evidence.

Whether a search and seizure are reasonable must depend upon the facts in each particular case. At the time of the seizure in the instant case the officers were engaged in the execution of a valid warrant directing the search of the premises for intoxicating liquor and property designed for its manufacture. They had no warrant for the seizure of papers *nor was any general search made therefor.* The documents seized were *incidentally discovered* while the officers were searching for liquor. The ledger was found on a shelf in a closet where a quantity of champagne was found in a trap under the floor. (R. 118, 126.) The various bills were found around and alongside the cash register in the kitchen (R. 107), where a quantity of liquor was seized (R. 117). It does not seem reasonable that officers should, upon making an arrest, be required to close their eyes to incriminating papers lying around in this fashion, which they incidentally come across while searching in good faith for contraband articles.

As authority for its statement that papers necessary to a criminal venture may be seized, the court in the *Kirschenblatt case* cites *State* v. *Mausert, supra,* and the decision in the instant case when the case was before the court below for the first time. While the ledger in question may not have been absolutely necessary to the conduct of the conspiracy charged, it did contain a record of liquor transactions, of gifts to policemen, and of the division of profits, and it was considered important enough by the defendants to their business to have it regularly audited by an accountant.

This Court has held that evidence incidentally discovered during a lawful search may be seized and used against a defendant without violating his constitutional rights. In *Adams* v. *New York,* 192 U. S. 585, a warrant authorized a search for paraphernalia used in the game of policy. The officers seized certain policy slips which were used in the game, and also certain other papers which were received in evidence against the defendant to identify his handwriting upon the slips and to show that the papers belonged to defendant and were in the same custody as the slips. This Court held that the defendant's constitutional rights had not been invaded.

In *Weeks* v. *United States,* 232 U. S. 383, 395, this Court said that the decision in the *Adams case* was put on the ground—

> that the papers found in the execution of the search warrant, which warrant had

> a legal purpose in the attempt to find gambling paraphernalia, were competent evidence against the accused, and their offer in testimony did not violate his constitutional privilege against unlawful search or seizure, for it was held that such incriminatory documents thus discovered were not the subject of an unreasonable search and seizure, and in effect that the same were *incidentally seized in the lawful execution of a warrant* and not in the wrongful invasion of the home of the citizen and the unwarranted seizure of his papers and property. (Italics ours.)

The cases relied on by petitioner are not in point. They involve seizures under invalid or inadequate search warrants, comprehensive searches for and seizures of private books and papers, or exploratory searches for incriminating evidence. Petitioner relies especially on *Kirvin* v. *United States,* 5 F. (2d) 282, as showing a conflict of decisions. In that case liquors, records, and papers were seized under a warrant directing a search for "liquor and records." The affidavit asked for the seizure of all intoxicating liquors found upon the premises, "together with any books, papers, records, or documents pertaining to the sale, possession, or transportation of intoxicating liquors." The court held the seizure of the records invalid because they were not sufficiently described, nor was there sufficient probable cause shown for the issuance of the warrant. The case apparently pre-

sents an attempt to authorize an exploratory search for evidence, which could no more be countenanced under color of a warrant than without one. While the opinion contains language which would seem to disagree with the views expressed in the instant case, the principle of seizure of evidence incidentally discovered was not considered, and the facts in the two cases are so different that it can not be said that they present a conflict of decisions.

If it be the law that no incriminating documents may be seized, during a lawful search for contraband under a valid warrant and as incident to a lawful arrest, unless found on the person of the one arrested, even though they are found lying around near seized contraband articles and constitute business records of the criminal operations, then the decision below was wrong and the constitutional rights of the petitioner were infringed. If this question is open to reasonable debate, or seems unsettled under the decisions, this case fairly presents it for decision, although there was abundant proof without resort to this documentary evidence, since it was shown by other testimony that petitioner rented the premises, paid the water and telephone bills, supplied the liquor and participated in its sale. (R. 156–8, 160, 234–241, 162–4.)

II

THE TESTIMONY OF WITNESS NEILSEN WAS ADMISSIBLE AND THE COURT'S INSTRUCTION THEREON WAS PROPER AND DID NOT PREJUDICE PETITIONER

Petitioner further contends that the testimony of witness Neilsen disclosed a conspiracy other than the one charged in the indictment, and that his testimony was therefore erroneously admitted in evidence, and that the court's instruction thereon was prejudicial.

Neilsen testified that he called at 1249 Polk Street, the premises in question, and, after buying a drink, received an order from petitioner to go out to the rum ship *Malahat* for a load of liquor. He did go out and brought back about one hundred cases of Scotch whiskey which was landed at Mission Rock. A day or two thereafter he was paid $300 for landing the liquor by petitioner at 1249 Polk Street. (R. 232–238.) Later Neilsen made two more trips, during one of which his boat was swamped and the liquor lost, but for landing the other load he was paid $450 by petitioner at the same address. (R. 238–241.) During one of the trips petitioner met Neilsen on the shore, where Neilsen also saw a truck. (R. 240.) This testimony obviously was relevant as showing the source from which the stock of liquor sold at the saloon conducted by the conspirators was replenished, as

ll as showing petitioner's participation in the nspiracy, and his contention that the testimony owed a separate and independent conspiracy is thout merit.

The instruction complained of was to the effect at if the Government had proved one or more of e overt acts charged in the indictment, it might rove any other overt acts by the conspirators med, or with unnamed conspirators, in furtherce of the object of the conspiracy; and in this nnection the court charged that if the Governent had proved one of the overt acts, the jury ight consider the testimony of Neilsen in deterining whether or not a conspiracy as charged in e indictment was established. (R. 305–306.) his instruction was proper and is not in conflict, s petitioner contends, with the decision in *Terry United States*, 7 F. (2d) 28, where the instruon condemned was to the effect that the jury ight convict the defendant of a crime not charged the indictment.

Moreover, there was ample evidence to sustain he conviction without Neilsen's testimony. As etitioner shows (Petition, pp. 2–3; Brief, p. 60), e was convicted by one jury without such testiony.

CONCLUSION

It is respectfully submitted that petitioner has hown no adequate grounds for the issuance of a

writ of certiorari, and the petition should therefore be denied.

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MARCH, 1927.

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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 185

JOSEPH F. MARRON, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

No opinion was rendered by the District Court. The two opinions rendered by the Circuit Court of Appeals are reported in 8 F. (2d) 251 and 18 F. (2d) 218, respectively.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 13, 1926 (R. 540), and rehearing denied January 31, 1927 (R. 541–542). The petition for a writ of certiorari was filed February 24, 1927, and was granted April 18, 1927 (R. 546). Jurisdiction to issue the writ is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

(*a*) Is it a violation of the Fourth Amendment for officers, during the orderly execution of a warrant directing a search for specified articles of contraband, to seize documents relating to the origin, keeping, use, and disposition of the contraband named in the warrant?

(*b*) Is it a violation of the Fourth Amendment for officers, after making a lawful arrest for an offense committed in their presence, to search the immediate premises wherein the offense was committed for proofs of guilt within the control of the accused but not upon his person?

(*c*) Is a ledger wherein were recorded items of payment for purchases and deliveries of intoxicating liquors, amounts received for its sale, "gifts" made to city police, and wages paid various persons employed in and about the place where said intoxicating liquor was sold and kept for sale in violation of the National Prohibition Act, a "means of commission" of the offense of conspiracy to violate that Act?

STATEMENT OF THE CASE

On October 1, 1924, Prohibition Agent C. A. Howard applied to a United States Commissioner in and for the Northern District of California for a warrant to search the entire second floor at 1249 Polk Street, San Francisco, California, for intoxicating liquors. Included in the application was an affidavit by Howard that the premises were owned or occupied by Eddie Marron; that intoxicating

liquors were kept, sold, possessed, and bartered there in violation of the National Prohibition Act; and that on or about September 22, 1924, the affiant had visited the premises and had purchased from the person in charge, who was fully described, fifteen drinks of Bourbon whiskey, for which he had paid fifty cents each. (R. 55–57.) On the same day the Commissioner issued a warrant authorizing the Federal Prohibition Director for the State of California, his assistants, agents, and inspectors, to enter the premises described in the affidavit and to search said premises for intoxicating liquors and for property used in connection with the manufacture thereof, and if found to seize and take possession of the same to be dealt with according to law. (R. 57–59.)

On October 2, 1924, Howard and three other Federal prohibition agents, with the search warrant in their possession, went to the premises in an automobile driven by one Fred Carmona. (R. 90, 136.) Under instructions from the agents, Carmona gave the signal required to gain admittance by ringing the door bell three times, whereupon the agents were admitted. (R. 132, 136–137.) Upon entering they found a dozen men and women present, some of them seated at a table upon which was a bottle containing whisky and a number of glasses, whereupon the officers seized the bottle and its contents. (R. 93–94.) The premises, comprising a flat of six or seven rooms, were unfurnished except for a davenport in one room, an ice chest in the kitchen, a num-

ber of tables and chairs, several slot machines, and a cash register. (R. 132.) The agents handed the search warrant to the person in charge, one George Birdsall (R. 121), whom they placed under arrest (R. 100, 125). Upon searching the place the agents found and seized a large quantity of intoxicating liquor of various kinds, some of which was secreted in a trap in a closet in the front room. (R. 138–139.) In the search of this closet the agents noticed on a shelf, either underneath or on top of a cigar box containing "a lot of greenbacks," an account book or ledger showing inventories of liquors, gross receipts, expenses, various gifts made to police officers, and other entries pertaining to the business carried on in the establishment. (R. 98, 118, 126–131, 144–146.) This ledger the officers took into possession (R. 126), as they did also a number of bills for gas, electric light, water, and telephone service furnished the premises. The bills were lying beside the cash register and were made out to petitioner as proprietor of the premises. (R. 103, 107–112.)

An indictment was subsequently returned in the District Court of the United States for the Northern District of California charging petitioner, together with Birdsall and four others, with conspiracy to commit various violations of the National Prohibition Act, including the maintenance of a common nuisance on the premises in question. (R. 3–50.) Prior to trial petitions were filed for the

return of the ledger and other papers seized and to suppress their use in evidence on the grounds, among others, that the affidavit and the search warrant based thereon did not mention or describe any papers to be seized, but called for the search for and seizure of liquors and paraphernalia for their manufacture; that the ledger and other papers seized were not the instruments or fruits of crime, but were the private papers and property of the petitioner, and that the seizure of such papers was in violation of the Fourth Amendment and their introduction in evidence would be in violation of the Fifth Amendment. (R. 51–76.) The petitions were denied. (R. 77–78.) Objections on the same grounds to the introduction of said book and papers during the trial were likewise overruled. (R. 95–98, 102–103.) At the trial a handwriting expert testified that ninety per cent of the entries in the ledger, beginning with page 34, were made by the petitioner. (R. 264–265, 286.) These entries showed that petitioner was the proprietor of, or at least a partner in, the illegal liquor business conducted on the premises. (R. 126–130.) Petitioner and four of his codefendants were convicted. Upon writs of error sued out by petitioner and three other defendants, the Circuit Court of Appeals reversed the judgment as to petitioner on the ground that evidence relating to the seizure of liquor from him at places other than the premises here involved had been erroneously received. The admission in evi-

dence of the ledger in question was, however, held proper. *Marron* v. *United States,* 8 F. (2d) 251.

Upon retrial the petitioner was again convicted (R. 83, 84) and was sentenced to two years' imprisonment in the Leavenworth Penitentiary and to pay a fine of $10,000 (R. 88–89). The conviction was affirmed by the Circuit Court of Appeals, which held that its former decision as to the admissibility of the documents in question had become the law of the case. (R. 536–537.) This Court thereafter granted a writ of certiorari to review the judgment of the Circuit Court of Appeals. The sole ground upon which petitioner asks that the judgment be reversed is that the seizure of the aforesaid book and papers and their admission in evidence against him over his objection violated his rights under the Fourth and Fifth Amendments.

SUMMARY OF ARGUMENT

Petitioner's reliance upon the Fifth Amendment is based solely upon the claim that the seizure of the ledger and of the water, gas, telephone, etc., bills violated his rights under the Fourth Amendment. The single broad question involved is, therefore, whether such seizure contravened the Fourth Amendment. As the officers were lawfully upon the premises pursuant to a valid search warrant and made no *search* for anything other than the articles named in the warrant, the only pro-

vision of the Fourth Amendment which has any application is that against unreasonable *seizures.*

The search was for liquor and other contraband articles. It was authorized by the valid search warrant in the officers' possession. It was likewise authorized as an incident to the lawful arrest made by the officers upon the premises for an offense committed in their presence.

Viewed as having been made by virtue of the warrant, the seizure of the documents in question, which were incidentally discovered in the course of an orderly search for the contraband named in the warrant, comes squarely within the decision of this Court in *Adams* v. *New York,* 192 U. S. 585, which in that respect has never been overruled or modified by this Court.

Viewed as having been made by virtue of the lawful arrest, the seizure of said documents as evidence tending to prove the offense for which the arrest was made was within the authority and duty of the officers to take whatever they found within the possession or control of the prisoner which might be of aid in securing his conviction of such offense.

Aside from its character as evidence, the ledger, used to record the transactions of the illegal business which constituted the crime, was a " means of commission " of such offense and therefore properly seizable as an incident to the lawful arrest.

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ARGUMENT

THE SEIZURE OF THE DOCUMENTS IN QUESTION WAS NOT "UNREASONABLE" UNDER THE FOURTH AMENDMENT

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment, so far as here material, reads:

> No person * * * shall be compelled in any Criminal Case to be a witness against himself * * *.

Reliance by petitioner upon the above-quoted provision of the Fifth Amendment is based solely upon the claim that the admission in evidence in the criminal prosecution against him of the ledger and other papers seized by the Federal officers compelled him to be a witness against himself because such seizure violated the Fourth Amendment. *Gouled* v. *United States,* 255 U. S. 298, 306–311; *Agnello* v. *United States,* 269 U. S. 20, 32–33. The single broad question in the case is, therefore, whether the seizure contravened the Fourth Amendment.

As appears from the record, the officers entered the premises pursuant to a warrant, the validity of which is unquestioned, authorizing them to search for and seize intoxicating liquors and property designed for the manufacture thereof. It further appears that upon entering the officers saw the offense of maintaining a common nuisance in violation of the National Prohibition Act committed in their presence, and that they immediately placed the person in charge under arrest. There is, moreover, nothing in the record to indicate that the officers made any *search* for incriminating documents and papers of any sort. On the contrary, the record plainly shows that the ledger and bills, the seizure of which forms the substance of petitioner's complaint, incidentally came to the officers' attention while they were conducting an orderly search for liquor and the means of manufacturing it. It is obvious, therefore, that the only provision of the Fourth Amendment which has any application to the facts of the instant case is that against *unreasonable seizures of papers,* and that that provision can be held to have been violated only by concluding that the seizure of the ledger and bills was not justified either as an incident to the search authorized by the warrant or as an incident to the lawful arrest made by the officers upon the premises.

The question of the reasonableness of the seizure in this case is not an easy one. The ten decisions of this Court from the *Boyd* to the *Byars case* have,

with the exception of the *Adams case,* which arose in a State court and related to a seizure by State officers, all involved circumstances of arbitrary action on the part of Government agents who searched without making an arrest at the place of search, and who entered either without a search warrant or under color of a warrant fraudulently or unlawfully obtained. Thus, no one of the cases wherein this Court has construed the Fourth and Fifth Amendments in relation to seizure of documents has grown out of circumstances similar to those of the instant case. Since, as frequently pointed out in comments from this Court, the application of the Fourth Amendment to each search must rest upon its own peculiar facts, none of the decisions from this Court are determinative of the issues here. The facts of this case present, in current litigation throughout Federal courts, one of the most frequent causes of appeal. District Courts have variously applied quotations from this Court, especially from the *Silverthorne* and *Gouled* opinions. Circuit Courts of Appeals have done likewise. Consequently, as pointed out by the Government in its brief in reply to the application for writ of certiorari in this case, a direct conflict has arisen between decisions in the Ninth Circuit, including the instant case and decisions in the Second Circuit, particularly in the *Kirschenblatt case.* The petitioner relies almost wholly upon opinions from the Second Circuit, backing them up by excerpts, torn out of their natural setting of facts, from the

Gouled, Silverthorne, Boyd, and *Weeks cases.* The *Kirschenblatt case* presents the most conservative view of the power of Government agents under the Fourth Amendment, deciding (a) that after arrest of a defendant *nothing except his person* may be searched for evidence of his guilt, and (b) that nothing may be seized incidentally to the execution of a lawful search warrant *except the articles named in that warrant.*

Interesting inquiries arise out of that extreme view. Must agents, observing a man in the commission of an offense, and after arresting him lawfully, *stay their hands* from picking up evidences of his crime which, before the officers could search his person, he may have thrown to the floor or concealed in the room where the crime was committed? Must officers, while lawfully searching for contraband named in a search warrant, *close their eyes* when a document closely related to possession and disposition of the contraband for which they are searching falls under their scrutiny? Is the Government to be limited, when its agents have gained lawful entry under warrant, to taking *only* the things which by foreknowledge the officers were able to list in the affidavit? Since the Government may use evidence which officious or malignant private citizens or State officers may have stolen or tricked from the possession of the defendant (*Burdeau* v. *McDowell*), are Government officers, engaged in a lawful and orderly search after lawful entry to have their hands tied from taking "evi-

dences of guilt" which may incidentally come to their attention during the search? Were the guaranties of the Fourth and Fifth Amendments meant to go that far? Do their spirit and purpose thus result in a premium on private evidence gathering and so disproportionately impair the effectiveness of Government officers who have made lawful entry and are engaged in orderly performance of their duties? The Second Circuit in the *Kirchenblatt case* answers "Yes." Petitioner herein argues for such construction. But the Government maintains, as decided by the Circuit Court of Appeals for the Ninth Circuit in the instant case, that the Fourth Amendment protects the citizen only against *unreasonable* searches and seizures. And it is not unreasonable for officers after lawful entry pursuant to a warrant while engaged in an orderly execution of the mandates of that warrant to take as incidental to its execution documents relating to the object of the search, the documents being thus "constructively" attached to the articles described in the warrant. On the contrary, we believe that for officers to be unable to take documents of that kind under such circumstances would be unreasonable. The Government further maintains that after an arrest for an offense committed in the presence of officers, it is not unreasonable for them to search for evidences of guilt, not only the person of the accused (a right long recognized throughout English and American law), but also the immediate environment where the crime was

seen to take place; that a lesser right would unduly hamper the administration of justice; that it would have a tendency to sanctify a criminal's isolation and secrecy after knowledge of his crime was in the possession of the Government, and that such restriction upon officers engaged in making a lawful arrest is beyond the intent of the Fourth and Fifth Amendments.

Certain clear doctrines applying the Fourth and Fifth Amendments to specific kinds of searches and seizures have been announced by this Court in a series of cases since 1885. Though none of these decisions, with the exception of the *Adams case,* as hereinafter pointed out, cover the facts of this case, a brief review of each to indicate its points of difference from the facts herein is deemed advisable.

Boyd v. *United States,* 116 U. S. 616 (1886): Plate glass was seized by the Collector under the customs laws. The United States Attorney filed an information for forfeiture. The District Judge, pursuant to Section 5 of the Customs Act of June 22, 1874, required the claimants to produce the invoice of twenty-nine cases of glass. Claimants resisted on the ground that in so far as the statute compelled production of evidence to be used against claimants in a forfeiture proceeding it was unconstitutional and void. In this contention they were sustained by this Court in an elaborate opinion holding that the Act violated both the Fourth and Fifth Amendments.

Adams v. *New York,* 192 U. S. 585 (1904): New York police officers seized, pursuant to a valid search warrant, policy slips and other papers incidentally discovered and related to the charge only in that they showed the defendant's custody, with knowledge, of the policy slips. Pretermitting the question of whether the claimed protection of the Fourth and Fifth Amendments against the use of the papers not named in the warrant extended to actions by State authorities, this Court decided that the seizure of the papers was lawful as incidental to the execution of the warrant. The facts in that case were very similar to those of the instant case and are more fully discussed under subdivision (A).

Weeks v. *United States,* 232 U. S. 383 (1914): Defendant was arrested at the Union Station in Kansas City. Police officers went to his home without a warrant and seized heirlooms, papers, stocks, bonds, and various personal effects. Later in the day the United States Marshal, without warrant, entered defendant's room and carried away letters from his chiffonier. A timely motion for their return was made and denied. This Court held the motion should have been granted and that the taking violated the Fourth Amendment. It distinguished the *Adams case,* pointing out that the documents in that case were not the subject of an unreasonable search and seizure, but, on the contrary, "incidentally seized in the lawful execution of a warrant and

not in the wrongful invasion of the home of the citizen" (p. 395). The decision further held that a court has a right to deal with papers in the hands of the District Attorney and officers of the court and should return those wrongfully taken when seasonable application for their return has been made. It is to be noted that in this case wrongful entry of the defendant's home under "color" of Federal office but *without legal sanction of any kind* was the object of condemnation by this Court.

Silverthorne Lumber Co. v. *United States,* 251 U. S. 385 (1920): The two Silverthornes were arrested at their home and held there for several hours during which time United States officers "without a shadow of authority" seized all the books and documents to be found at their office and brought them with all employees to the office of the District Attorney. An immediate application was made for the return of the property seized. Meantime copies were made. The District Court ordered the originals returned but impounded the copies. *Subpœnas duces tecum* were then issued to produce the originals. The defendants resisted, were fined, and ordered imprisoned. This Court held that to assume that the "Constitution covers the physical possession but not any advantages that the Government can gain over the object of its pursuit by doing the forbidden act" has the effect of reducing "the Fourth Amendment to a form of words." Holding that the *Adams case* was distinguishable, the opin-

ion cited with approval the principles stated in *Flagg* v. *United States,* 233 Fed. 481, 483. The *Flagg case* involved an *unauthorized entry,* seizure of defendant's books and papers, denial of his timely application for their return, and the study of them for three years, with final prosecution and conviction based thereon. But in neither it nor in the *Silverthorne case* did search of the place follow a valid arrest made for an offense committed there in the officer's presence, nor was the seizure incidental to search after lawful entry under a warrant.

Gouled v. *United States,* 255 U. S. 298 (1921): This opinion has been perhaps misapplied in lower courts more often than any other. To decide whether a search or seizure has been unreasonable it is necessary to look into the facts of each case. This one arose on certificate from the Second Circuit. The certificate recites but meager facts; the opinion even less. Both, therefore, should be read together. The certificate is not set forth in the opinion but, from an examination of it, it appears that one Cohen, a private in the Intelligence Service of the Army, by fraud gained access to Gouled's office and carried away several documents, and that Gouled did not know this until confronted by Cohen's testimony at the trial. Later a warrant was issued to search for papers alleged by affidavit to be in Gouled's possession and they were seized. Motion was made for their return, which was denied. The first question relating to the right to use papers purloined from the defendant's office

by a Government agent was, of course, answered negatively.

The four other questions dealt with whether documents taken under the warrant calling for a search for papers "of evidential value only" could be used against the defendant. Although the certificate shows and the Court comments upon the fact that no attack was raised on the validity of the search warrant, in reality the opinion admits of no other conclusion than that it was wholly void. The Court said (p. 309): "There is no special sanctity in papers, * * * to render them immune from search and seizure," but—

> search warrants * * * may not be used as a means of gaining access to a man's house or office and papers *solely for the purpose of making search to secure evidence* to be used against him in a criminal or penal proceeding, but that they may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, * * *. (Italics ours.)

It is manifest, therefore, that this case rests upon the familiar principle found in every opinion from this Court on the subject that, absent an arrest or a lawful warrant issued upon an affidavit showing evidence of probable cause fairly obtained, agents of the Government may not under color of their governmental authority or its processes go rummaging into a man's house. Again we observe the

real gravamen of the agent's offense which this Court condemned lies in the wrongful entry, and all that grew out of that original fraud, though it later assumed the guise of legality, failed to change its unconstitutional character. Cohen's entry with the opening wedge of information he obtained was like that of the marshal in the *Weeks case* and like that of the officers who ransacked the corporation office in the *Silverthorne Lumber Company case.* In the latter the United States Attorney tried to lend color by securing an invalid *subpœna duces tecum* to recapture the evidence. The Intelligence Department used Cohen's first stolen information to secure a search warrant which had no sufficient affidavit of facts for its issuance. It was just a cloak to cover the real motive, which was to go rummaging for more evidence. Substantially, therefore, the purported search warrant was *no* search warrant. Such a situation is far different from that in the instant case, where the affidavit upon which the warrant issued was unusually full; the warrant was regular and valid, the entry lawful, and seizure of the ledger and papers is justified either as an incident to the execution of the search warrant, or as an incident to the right of search arising from the arrest of one found in crime.

Amos v. *United States,* 255 U. S. 313 (1921): Here again Government agents, without warrant of any kind and using the coercion of the fact that they were Federal officers, gained admittance to the

defendant's home and store and seized certain articles for the return of which application was made and denied. Reversal was ordered on authority of the *Gouled case*.

Burdeau v. *McDowell,* 256 U. S. 465 (1921): McDowell was discharged from the employ of Henry L. Doherty & Company, of New York, for whom he had acted as manager of their Pittsburgh office. An officer of the Doherty Company, with private detectives, took possession of two rooms, one of which was alleged to be McDowell's private office, blew open safes, and took correspondence and papers. Some were turned over to Burdeau, prosecuting officer of the Department of Justice. McDowell made application in the Federal District Court for the return of documents held by Burdeau. The District Court granted the petition. This Court overruled the decision of the District Court, holding that while that court had authority to control the disposition of the papers, and they might have been subpœnaed from the custody of the thief, nevertheless the protection of the Constitution extends only to governmental action, and as the papers had come into the possession of the Government without a violation of petitioner's rights by governmental authority, there was no reason why the fact that individuals unconnected with the Government might have wrongfully taken them should prevent their being used for prosecuting the defendant.

Carroll v. *United States,* 267 U. S. 132 (1925): This case set up the rule for search of moving vehicles without warrant where the officer has probable cause for believing them to be carrying contraband.

Agnello v. *United States,* 269 U. S. 20 (1925): Officers seeing defendant sell narcotics arrested him and searched the immediate vicinity of the commission of the offense. Then while defendants were being taken to the police station other officers went to Agnello's home, searched it, and found cocaine. The Government offered testimony of this fact, objection to which was overruled. Defendants were convicted. This Court in reversal as to Agnello held that the search of his home several blocks from the scene of the arrest was an unreasonable search. In this case the same distinction exists as in the others from the case at bar—no valid search warrant gave entry, nor was the arrest made at the place searched.

Byars v. *United States,* 273 U. S. 28 (1927): Defendant's home was searched by police armed with a municipal search warrant. A Federal prohibition agent accompanied the city officers and assisted them. Strip stamps were seized and retained by the Federal officer. The defendant was charged in United States Court with unlawful possession of counterfeit stamps. He made timely motion for the return of the stamps, which was denied, and he was convicted. This Court, in reversing the judgment, held that the facts reasonably suggested that

the Federal officer shared in the responsibility of the seizure; that the search warrant would have been bad under Federal law; that although the right of the Federal Government to use evidence improperly seized by State officers operating entirely upon their own account is not to be questioned, the rule is otherwise when a Federal agent, under color of his office, participates in the wrongful search and seizure.

Throughout all these cases the Court, in applying the constitutional rights of the citizen, has jealously guarded his home, and, in wider area, his entire premises and effects, from unlawful *entry*. That has led not only to rejection of evidence which Federal officers secured by breaking locks, but also what they obtained by abusing the use of a search warrant, in making entry under color of one illegally issued or fraudulently obtained. It has led to condemnation of any encroachment under "color of Federal office."

The Fourth Amendment has thus been construed to protect the citizen from disorderly intrusion of irresponsible administrative officials. It has never been used by this Court to strengthen a criminal's efforts at isolation and secretion of evidence *after sufficient knowledge of his crime has been obtained to secure a lawful warrant of arrest or search of his premises.* When a citizen is surprised in the commission of crime and arrested, the constitutional protection he could otherwise claim yields to the larger right of the sovereign to search him. So, too,

when a place is known to harbor unlawful articles, the constitutional right to keep the arm of the law out of that place yields to the right of the sovereign to enter and take not only what may have been known to be harbored there and therefore named in the warrant as the objects of search, but other things incidentally discovered which closely relate thereto. As stated by the Circuit Court of Appeals for the Eighth Circuit in *Furlong* v. *United States,* 10 F. (2d) 492, 494:

> Considering our increasing failure in dealing with crime, there is the highest wisdom in the following statement of the Supreme Court in *Carroll* v. *United States,* 267 U. S. 132:
>
> "The Fourth Amendment denounces only such searches or seizures as are unreasonable, and it is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interest as well as the interests and rights of individual citizens."

(A) THE SEIZURE WAS VALID AS INCIDENT TO THE EXECUTION OF THE SEARCH WARRANT

The doctrine of incidental seizure of documents or articles discovered while executing a search warrant was first recognized by this Court in the case of *Adams* v. *New York, supra.* The plaintiff in error in that case had been convicted in a court of the State of New York for violation of a statute of that

State making it an offense to have in possession gambling paraphernalia used in the game known as "policy." It appeared that in a raid of the defendant's premises police officers, having in possession a warrant authorizing a search for policy slips, not only seized some 3,500 such slips, but also seized and carried away a number of private papers belonging to the defendant of merely evidentiary value. These private papers were offered in evidence at the trial for the purpose of identifying the defendant's handwriting on the policy slips and of establishing his possession, with knowledge, of such slips. An objection by the defendant that said papers were inadmissible because seized in violation of his rights under the Fourth Amendment to the Constitution of the United States and that to receive them in evidence would compel him to be a witness against himself in violation of the Fifth Amendment was overruled and the papers were admitted. That action of the trial court was affirmed by the Court of Appeals of New York and the defendant brought the case to this Court upon writ of error setting up the aforesaid claims of denial of Federal constitutional rights. Passing the question of whether the Fourth and Fifth Amendments applied to state action, this Court decided the case on the merits and affirmed the judgment. After stating in the opinion that the right to seize lottery and gambling devices, such as policy slips, required no argument to sustain it, this Court said (p. 598):

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> But the contention is that, if in the search for the instruments of crime, other papers are taken, the same may not be given in evidence. As an illustration, if a search warrant is issued for stolen property and burglars' tools be discovered and seized, they are to be excluded from testimony by force of these amendments. We think they were never intended to have that effect, but are rather designed to protect against compulsory testimony from a defendant against himself in a criminal trial, and to *punish wrongful invasion of the home of the citizen* or the unwarranted seizure of his papers and property, and to render invalid legislation or judicial procedure having such effect. (Italics ours.)

In the subsequent case of *Weeks* v. *United States, supra,* where a conviction in a Federal court was set aside because based in part upon the introduction in evidence of private papers of the defendant seized in his home by a United States marshal without a warrant, this Court, distinguishing the case from that of *Adams* v. *New York, supra,* stated the effect of the latter case as follows (pp. 395, 396):

> Pretermitting the question whether these amendments applied to the action of the States, this court proceeded to examine the alleged violations of the Fourth and Fifth Amendments, and put its decision upon the ground that the papers found in the execution of the search warrant, which warrant

had a legal purpose in the attempt to find gambling paraphernalia, were competent evidence against the accused, and their offer in testimony did not violate his constitutional privilege against unlawful search or seizure, for it was held that such incriminatory documents thus discovered were not the subject of an unreasonable search and seizure, and in effect that the same were incidentally seized in the lawful execution of a warrant and not in the wrongful invasion of the home of the citizen and the unwarranted seizure of his papers and property. * * *

* * * * *

It is therefore evident that the *Adams Case* affords no authority for the action of the court in this case, when applied to in due season for the return of papers seized in violation of the Constitutional Amendment. The decision in that case rests upon incidental seizure made in the execution of a legal warrant and in the application of the doctrine that a collateral issue will not be raised to ascertain the source from which testimony, competent in a criminal case, comes.

The decision in the *Adams case,* as thus explained in the *Weeks case,* has never been overruled by this Court. It recognizes a manifestly just and moderate view of the duties of Government officers in execution of a search warrant. It may be suggested that to permit agents to carry away anything not named in the warrant is establishing a region of doubt where the rights of search would be uncer-

tain; but applying the rule of incidental seizure would be no more difficult than applying the doctrine of probable cause as announced in the *Carroll case,* which authorizes an officer to stop and search a moving vehicle. Elements by which each seizure could be fairly tested are apparent. It would, first, have to be upon a lawful warrant, issued upon probable cause to search for *actually named articles* which would form the true and primary object of the issuance of the warrant. It could not, as in the *Gouled case,* arise from a warrant issued to give color to a real motive to turn things over to find evidence. Second, the evidentiary articles seized would have to be found near and discovered incidentally to orderly and lawful steps taken in hunting for things named in the warrant. And third, the articles incidentally seized would have to *relate to* the materials forming the primary objects of the search. Although, as frequently quoted from the *Boyd case, supra,* p. 635, "It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon," this should not be so done as to multiply devious methods to sequester evidence of crime and to delay and impede the enforcement of criminal laws. The decisions from the Second Circuit in the *Kirschenblatt* and *Kirvin cases* upon which petitioner relies would have the latter effect. The Government may use evidence illegally gathered by others than its own officers. To balance that, and check a growing tendency toward law enforcement

through informants and zealous groups of private citizens it is important that the authority for Government agents to seize evidences of crime incidentally discovered should be upheld to the farthest margin of constitutional limitation. Of course suggestions of expediency can not override the guaranties of the Fourth Amendment. But it is fitting in close cases such as this to consider both the interests of the citizen and those of the sovereign, and to weigh them, in order to discover if possible the interpretation which will strengthen the orderly efforts of Federal agents in gathering evidence of law violation.

(B) THE SEIZURE WAS VALID AS INCIDENT TO A LAWFUL ARREST UPON THE PREMISES

The seizure of the ledger and other papers complained of was made by the Federal officers after they had arrested the defendant Birdsall for offenses against the National Prohibition Act committed in their presence. The general character and equipment of the place, the signal required to gain admittance, and the whiskey and glasses on the table at which patrons were seated were ample to apprise the officers that intoxicating liquor was possessed and sold on the premises and that the place was being maintained as a common nuisance in violation of the Federal Act. There can be no question, therefore, that the arrest of Birdsall, as the person found in charge of the establishment, was lawful.

The weight of authority is that upon a lawful arrest the arresting officer may seize whatever he finds either upon the person of the offender, or otherwise within his possession or control, which may be of aid in proving the offense. As stated in Wharton's Criminal Procedure, 10th Ed., Section 97:

> The general rule of law is that, in the absence of a statute, an officer has no right to take money or property from the person *or possession* of a prisoner, *except such as may afford evidence of the crime charged,* which is a means of identifying the criminal, or which may be helpful to the prisoner in effecting an escape. The officer has an undoubted right to make a search, and considering the nature of the accusation he may, when acting in good faith, take into his possession *any articles which he may suppose will aid in securing the conviction of the prisoner,* or will prevent his escape. (Italics ours.)

Upon the same subject, Bishop in his work on Criminal Procedure, 3d Ed., Section 211, says:

> The arresting officer should consider the nature of the accusation; then, if he finds on the prisoner's person, *or otherwise in his possession,* either goods or money which he reasonably believes to be connected with the supposed crime, as its fruits, or as the instruments with which it was committed, *or as supplying evidence relating to the transaction,* he may take them, and hold them to

be disposed of as the court shall direct. (Italics ours.)

In *Weeks* v. *United States,* 232 U. S. 383, this Court, pointing out that the search and seizure in that case by a United States Marshal without a warrant did not fall within the recognized instances where a search and seizure without a warrant may lawfully be made, said (p. 392):

> What then is the present case? Before answering that inquiry specifically it may be well by a process of exclusion to state what it is not. It is not an assertion of the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits *or evidences of crime.* This right has been uniformly maintained in many cases. 1 Bishop on Criminal Procedure, Section 211; Wharton, Crim. Plead. and Practice, 8th ed., Section 60; *Dillon* v. *O'Brien and Davis,* 16 Cox. C. C. 245. * * * Nor is it the case of burglar's tools *or other proofs of guilt* found upon his arrest *within the control* of the accused. (Italics ours.)

In *Carroll* v. *United States,* 267 U. S. 132, 158, the right to search and seize as an incident to a lawful arrest was defined as follows:

> When a man is legally arrested for an offense, whatever is found upon his person *or in his control* which it is unlawful for him to have and *which may be used to prove the offense* may be seized and held as evidence

in the prosecution. *Weeks* v. *United States,* 232 U. S. 383, 392; *Dillon* v. *O'Brien and Davis,* 16 Cox. C. C. 245; *Getchell* v. *Page,* 103 Me. 387; *Kneeland* v. *Connally,* 70 Ga. 424; 1 Bishop, Criminal Procedure, Sec. 211; 1 Wharton, Criminal Procedure (10th edition), Sec. 97. (Italics ours.)

Other cases in which the above statement by Bishop is cited as a correct exposition of the law are:

Furlong v. *United States* (C. C. A., 8th), 10 F. (2d) 492.

Sayers v. *United States* (C. C. A., 9th), 2 F. (2d) 146.

United States v. *Wilson* (S. D., N. Y.), 163 Fed. 338.

Getchell v. *Page,* 103 Me. 387.

In the *Furlong case* prohibition officers went to the defendant's soft-drink place and purchased whiskey with a marked one dollar bill. They thereupon signaled other Federal officers, who rushed in. The officer in charge demanded that the marked bill be handed over to him, and in compliance with that demand the bartender, at Furlong's direction, opened the cash register, took out the bill, and handed it to the officer. In a subsequent prosecution of Furlong for violation of the National Prohibition Act the bill was introduced in evidence over the defendant's objection that it was obtained by an unconstitutional search and seizure. Holding the evidence to have been properly received, the Circuit

Court of Appeals, after quoting Bishop's statement of the law, *supra,* said (p. 494):

> This statement is approved by the Supreme Court in *Carroll* v. *United States,* 267 U. S. 132, 158; *Weeks* v. *United States,* 232 U. S. 383, 392. See, also, *Agnello* v. *U. S.,* 269 U. S. 20.
>
> The same doctrine is laid down in *Holker* v. *Hennessey,* 141 Mo. 527; *Ex parte Hurn,* 92 Ala. 102; *Getchell* v. *Page,* 103 Me. 387.
>
> It is the duty of the officer making an arrest to take money or other articles connected with the crime, or evidencing its commission, from the person of the defendant, or from his possession or control, and hold the same subject to the order of the court. In this case the officer had the same right to take the marked bill from the defendant's cash register as from his pocket. The extent of the search and seizure at the time of arrest must depend to some extent upon the nature of the crime.
>
> See, in addition to the above authorities, *Ash* v. *Commonwealth,* 193 Ky. 452; *Ragland* v. *Commonwealth,* 204 Ky. 598; *Sayers* v. *United States* (C. C. A.) 2 F. (2d) 146; *Brady* v. *United States* (C. C. A.) 300 F. 540.

In *Sayers* v. *United States, supra,* Federal officers were admitted by the defendant to a room on the second floor of a hotel upon their ringing the bell, and at their request were served by her with whiskey, which she procured from an adjoining kitchen

and for which they paid. The officers thereupon placed her under arrest and made a search which resulted in the finding of a large quantity of beer and the defendant's meat bill in the kitchen, and her record of savings and beer purchases and light bill in her room across the hall. The articles thus seized were later admitted in evidence over the defendant's objection that they had been obtained by an unlawful search and seizure. That action of the District Court was sustained by the Circuit Court of Appeals, which said (p. 147):

> A lawfully arrested person may be searched for instruments, fruits, and evidences of the crime; and, if taken in commission of the crime in a building, the latter may be likewise searched to the extent that the offender's control and activities likely extended. This is the law since the Fourth Amendment, even as it was law before it, is reasonable, and is not within the amendment's ban upon unreasonable searches and seizures. See *Adam's Case,* 192 U. S. 585; *Week's Case,* 232 U. S. 383; *Gouled's Case,* 255 U. S. 309; *U. S.* v. *Wilson* (C. C.) 163 F. 338.
>
> In any such search, not only may the instruments and fruits of crime be seized, but mere evidentiary articles, including papers incidentally discovered, may be likewise seized. This was expressly held in *Adam's Case, supra,* and has not been departed from in any qualification of said case. "There is no special sanctity in papers, as distin-

guished from other forms of property, to render them immune from search and seizure, if only they fall within the scope of the principles of cases in which other property may be seized." *Gouled's Case, supra.* Of a person arrested, every garment and pocket may be searched, and the same principle authorizes that of a building, generally every room may be searched.

In the circumstances of the instant case, the arrest of defendant and the search of adjacent rooms and seizure of liquors and papers were a duty, were legal, and were not unreasonable within the import of the Fourth Amendment.

In *Getchell* v. *Page, supra,* local State enforcement officers executing a search warrant found liquor on the premises. They thereupon arrested the owner and seized and carried away as evidence certain articles not named in the warrant. In a subsequent suit for trespass brought by the owner against the officers the Supreme Judicial Court of Maine held that the officers were justified in seizing such property, saying (p. 390):

> It is well settled that an officer making an arrest upon a criminal charge may also take into his possession the instruments of the crime and such other articles as may reasonably be of use as evidence upon the trial. The officer not only has the lawful power to do so, but he would be blameworthy if he failed to do so. The maintenance of public order and the protection of society by effi-

> cient prosecution of criminals require it. The title to the property remains in the owner, but the lawful possession is temporarily in the officer for evidentiary purposes, subject to the order of court. *Thatcher* v. *Weeks,* 79 Maine, 547; *Spalding* v. *Preston,* 21 Vt. 10; Bishop, Crim. Pro. 211.

In *Smith* v. *Jerome,* 93 N. Y. Supp. 202, the plaintiff and his wife were arrested in Cincinnati as fugitives from justice and returned to New York, where they were under indictment for conspiracy. At the time of their arrest the Cincinnati police searched their room and found among their effects certain letters which tended to prove them guilty of the offense with which they were charged. These letters were forwarded to the District Attorney in New York against whom the plaintiff brought suit to get them back. Holding that the plaintiff's petition must be denied, the court said:

> The police have the power and it is also their duty to search the person of one lawfully arrested, and also the room or place in which he is arrested, and also any other place to which they can get lawful access, for articles that may be used in evidence to prove the charge on which he is arrested. We have no statute defining this power or prescribing this duty, but the ends of justice require that they should exist, and they have been exercised under the common law from time immemorial. The authorities on this head seem to be few, but only because the thing has

seldom if ever been questioned. We have at least one such authority in this state (*Houghton* v. *Bachman*, 47 Barb. 388), and there are several in England. This right and duty of search and seizure extend, however, only to articles which furnish evidence against the accused. They do not, for instance, permit the seizure of his money, unless it furnishes evidence of his guilt, and in no other case may a prisoner's money or other property to be taken from him. It does not sufficiently appear that the letters in question are not of such incriminating character.

Conceding the correctness of the general principle announced by the foregoing authorities, petitioner says:

> We are in accord with the academic principle that a person accused of crime may be searched, and instruments, fruits and evidences of crime may be seized from his person and from the premises in which the alleged crime has been committed * * *.

He insists, however, that only such evidence may be taken as forms an integral part and parcel of the crime. (Br. 15.) Certainly, as regards seizures from the person, petitioner's contention is wide of the mark. It is so well settled that *any evidence tending to prove the crime*, whether documentary or otherwise, may be seized from the person of one arrested that it will suffice to direct the Court's attention to one or two recent decisions on the subject.

In *People* v. *Chiagles,* 237 N. Y. 193, the defendant, upon his arrest for a felony, was searched and certain letters taken from his person. He moved for their return on the ground that their seizure was in violation of Section 8 of the Civil Rights Law of New York, which is substantially identical with the Fourth Amendment to the Constitution of the United States. The denial of that motion was sustained by the Court of Appeals in a well-considered opinion by Judge Cardozo wherein it was said (p. 195):

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, ought not to be violated; and no warrants can issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." (Civil Rights Law, Sec. 8; Consol. Laws, ch. 6.) It is thus the statutes of New York express the principle that English law received as the outcome of the prosecutions of Wilkes and Entick. (*Entick* v. *Carrington,* 19 Howell's State Trials, 1030; *Wilkes' Case,* 19 Howell's State Trials, 1405; *Boyd* v. *U. S.,* 116 U. S. 616, 626.) The immunity is not from all search and seizure, but from search and seizure unreasonable in the light of common-law traditions. If immunity is to be conceived of as the rule, there is one exception that has been established as firmly as the rule itself. The government may "search the person of the accused when

legally arrested to discover and seize the fruits or evidences of crime." (*Weeks* v. *U. S.*, 232 U. S. 383, 392.) There is no dearth of illustrative precedents both in our own country and abroad. (*Dillon* v. *O'Brien*, 16 Cox C. C. 245; *U. S.* v. *Snyder*, 278 Fed. Rep. 650; *U. S.* v. *Wilson*, 163 Fed. Rep. 340; *U. S.* v. *Welsh*, 247 Fed. Rep. 239; affd., 267 Fed. Rep. 819; *U. S.* v. *Murphy*, 264 Fed. Rep. 842; *Woolfolk* v. *State*, 81 Ga. 551, 562; *People ex rel. Murphy* v. *Brown*, 83 Wash. 100; *Getchell* v. *Page*, 103 Me. 387; *State* v. *Hassan*, 149 Ia. 518, 524; *Closson* v. *Morrison*, 47 N. H. 482, 484; *Houghton* v. *Bachman*, 47 Barb. 388; 1 Bishop Crim. Pr., Sec. 211; 9 Halsbury Laws of England, p. 309; 13 id. p. 510.) The right goes back beyond doubt to the days of the hue and cry, when there was short shrift for the thief who was caught "with the mainour," still "in seisin of his crime." (2 Pollock & Maitland History of English Law, 577, 578.) The defendant, conceding the right, would, none the less, restrict the seizure to things subject to be taken under a search warrant when there is no arrest of the possessor. Search is then confined under our statute to property stolen or embezzled, or used as the means of committing a felony, or held with the intent to use it is an instrument of crime. (Code Crim. Pro. Sec. 792). We find no support for a like restriction upon search incidental to arrest. The books speak broadly of searching the person of the prisoner for anything "that may be of use as evidence upon the trial"

(*Thatcher* v. *Weeks,* 79 Me. 547, 549), or for anything "that will aid in securing the conviction" (*Holker* v. *Hennessey,* 141 Mo. 527, 539; cf. *Weeks* v. *U. S., supra.* If things of evidential value are to be excluded unless of such a nature as to be themselves the instruments of felony, the line may not be drawn between books and papers on the one hand and other articles on the other. "There is no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure, if only they fall within the scope of the principles of the cases in which other property may be seized." (*Gouled* v. *U. S.,* 255 U. S. 298, 309.) Letters to or from accomplices found on the person of a conspirator, and evidencing the plan or the execution of the conspiracy (cf. *Dillon* v. *O'Brien, supra,* at p. 248) will have to be returned to the prisoner for concealment or destruction if only the fruits or the implements of crime may be retained; but so also will a murderer's garments, stained with his blood in the course of the affray. Garments thus bespattered are typical examples of the things that precedent and practice permit the Government to keep. (*Woolfolk* v. *State, supra; State* v. *Baker,* 33 W. Va. 319.) The basic principle is this: Search of the person is unlawful when the seizure of the body is a trespass, and the purpose of the search is to discover grounds as yet unknown for arrest or accusation. (*Entick* v. *Carrington, supra.*) Search of the person becomes lawful when grounds for arrest and accusation have been

> discovered, and the law is in the act of subjecting the body of the accused to its physical dominion.

In the later case of *United States* v. *Kirschenblatt*, 16 F. (2d) 202, the Circuit Court of Appeals for the Second Circuit, citing the *Chiagles case* and many of the authorities therein referred to, observed (p. 203):

> It is true that the law has never distinguished between documents and other property found upon the person of one arrested. All may be used in the trial, so far as relevant.

If, therefore, as appears to be established beyond question, anything found upon the person of the one arrested may be seized if it tends to prove the offense for which the arrest is made, it can hardly be said that an unreasonable search and seizure within the Fourth Amendment results if the officer, looking about the place where the crime is committed, finds and takes similar evidence which the offender has thrown to the floor, or which the officer sees on a table, or in a drawer thereof, or in a closet. It is manifestly to cover instances of the latter sort that the rule, as stated by the authorities, embraces not only what is found on the person of the offender but what is found *otherwise in his possession or control*. Were the rule limited to things found on the person, the offender might in many cases prevent a conviction by the simple device of discarding damaging evidence from his person before the offi-

cer who saw him commit the illegal act could reach him. Certainly no such result is required by the Fourth Amendment. To say that the rule is so restricted would be to assert that if officers come upon a gambling place, an opium den, or a blind pig, see it in full operation, and arrest those in charge, they may search only the persons of those arrested for evidence of the scope of the crime and must stay their hands from taking documents lying all about relating to the placing of bets, the purchase of opium or liquor, and the payment of police graft, which so frequently underlies the maintenance of such environments of crime? Is it reasonable to assume that the Fourth Amendment extends such immunity to the *locus* of crime that, after officers have entered lawfully, seen the commission of the offense, and arrested the proprietors, the place may not be made to yield not only its contraband but the "other proofs of guilt" that accumulate at crime headquarters? If it is reasonable to strip the pockets of one put under arrest, is it an unreasonable seizure to take what may be lying at hand relating to the offense at the spot where the violation of law was in progress? And in seriously seeking the replies to such inquiries as they affect this case we are not dealing with the search of a man's home and the ransacking of his personal documents and effects. We are dealing, rather, with an offense which essentially had to have headquarters or guilty *res* for its commission, with a public place which was observed in full

illegal operation, and with the seizure of its book of account and the bills for its upkeep.

Recognizing the logic of extending the right to search beyond the person of the prisoner but declining to follow it, the Circuit Court of Appeals for the Second Circuit in the *Kirschenblatt case, supra,* said (p. 203):

> While we agree that strict consistency might give to a search of the premises, incidental to arrest, the same scope as to a search of the person, it seems to us that that result would admit exactly the evils against which the Fourth Amendment is directed. Whatever the casuistry of border cases, it is broadly a totally different thing to search a man's pockets and use against him what they contain, from ransacking his house for everything which may incriminate him, once you have gained lawful entry, either by means of a search warrant or by his consent. The second is a practice which English-speaking peoples have thought intolerable for over a century and a half. It was against general warrants of search, whose origin was, or was thought to be, derived from Star Chamber, and which had been a powerful weapon for suppressing political agitation, that the decisions were directed, of which *Entick* v. *Carrington,* 19 How. St. Trials, 1029, is most often cited. These cases were decided just after the colonists had been hotly aroused by the attempt to enforce customs duties by writs of assistance, and when within 30 years they framed the Fourth Amendment it was

general warrants that they especially had in mind. *Boyd* v. *U. S.*, 116 U. S. 616.

The Circuit Court of Appeals here lost sight of the premise upon which its statement was based, namely, that there had been a lawful arrest. It is doubtless true, in the absence of such an arrest, that premises may not be searched for everything which may incriminate the owner either by an officer who has gained a lawful entry thereto by virtue of a search warrant, or by one admitted by consent of the owner. There is, furthermore, nothing in *Entick* v. *Carrington* or in *Boyd* v. *United States,* cited by that court, to indicate that the English-speaking peoples regarded it as intolerable to search the premises where a lawful arrest had been made for evidence which would aid in the conviction of the offender. *Entick* v. *Carrington* was an action of trespass against certain officers who had arrested the plaintiff and searched for and seized his books and papers under authority of a general warrant. Holding that the warrant was void as having no sanction in the statutory or common law of England, the court gave judgment for the plaintiff. As the warrant was void the arrest made under it was, of course, unlawful. The *Boyd case* dealt with the constitutionality of a Federal statute pursuant to which Boyd had been compelled, by an order of the court, to produce a paper desired by the Government as evidence in an action to forfeit his property. In neither case did the court discuss or have in view a search and seizure made as an inci-

dent of a lawful arrest. It was so declared as to the *Entick case* in *Dillon* v. *O'Brien and Davis,* 16 Cox Crim. Cas. 245, where Palles, C. B., observed (p. 251):

> For myself I am satisfied that, in pronouncing that judgment, Lord Camden had not before his mind cases of seizure of evidences of guilt upon lawful apprehension, as distinguished from general warrants to seize all papers.

The principle giving rise to the rule that evidence found in the possession or control of one lawfully arrested may be seized and used against him in a prosecution of the offense is clearly stated in the leading case of *Dillon* v. *O'Brien and Davis,* above cited. That case arose in Ireland and was an action by Dillon to recover damages from certain peace officers for their alleged illegal arrest of the plaintiff and their seizure of certain bank notes, coins, and documents belonging to him. In defense of the action the officers averred that, having procured a warrant for the arrest of the plaintiff on a complaint that he was engaged with others in the commission of certain acts (conceded at the trial to amount to a conspiracy at common law), they went to the plaintiff's home in the execution of the warrant and there found him in a room with other parties to the conspiracy "engaged in receiving rents from certain tenants, and had books and papers in which they were making entries of the receipt of those rents, and also a certain tele-

gram, all of which were being used for the purpose of such combination and conspiracy"; that the defendants thereupon arrested the plaintiff and took into possession and detained the bank notes, coins, and papers "then being in the said house and room," for the purpose of producing the same as evidence in the prosecution of the plaintiff and others for the conspiracy charged. It was argued for the plaintiff that this statement of defense showed no justification for the seizure of the plaintiff's property; that whether or not the seizure would have been justified had the plaintiff been found committing a felony, it was not justified in the case at bar where the offense was merely a misdemeanor. The judgment of the court was announced by Palles, C. B. Following a review of the cases involving a seizure for evidentiary purposes of property found in the possession of one apprehended in the commission of a felony, he said (p. 249):

> I, therefore, think that it is clear, and beyond doubt, that, at least in cases of treason and felony, constables (and probably also private persons) are entitled, upon a lawful arrest by them of one charged with treason or felony, to take and detain property found in his possession which will form material evidence in his prosecution for that crime; and I take the only real question upon this defence as being, whether this right extends to cases of misdemeanour. No case has been cited in which the right (in reference to mis-

demeanour) has been judicially decided to exist, and no textbook draws the distinction here attempted to be drawn. The matter must, therefore, be determined on principle. For this purpose I must first ascertain the reason of the rule as applicable to felony. * * * Its purpose and object, viz, to produce the goods in evidence in a judicial proceeding, appears to me to show that it must be derived from the interest which the State has in a person guilty (or reasonably believed to be guilty) of a crime being brought to justice, and in a prosecution, once commenced, being determined in due course of law. * * * The paramount nature of this interest is well illustrated by the power which, for the purpose of enforcing it, the law gives to the officer in whose custody a person charged with a crime lawfully is. There is no doubt that he may kill his prisoner in case of resistance if he can not otherwise secure his custody; and this as well when the charge is misdemeanour as felony. But the interest of the State in the person charged being brought to trial in due course necessarily extends, as well to the preservation of material evidence of his guilt or innocence, as to his custody for the purpose of trial. His custody is of no value if the law is powerless to prevent the abstraction or destruction of this evidence, without which a trial would be no more than an empty form. But if there be a right to production or preservation of this evidence, I can not see how it can be enforced otherwise than by capture.

> If material evidences of crime are in the possession of a third party, production can be enforced by the Crown, by *subpœna duces tecum*. But no such writ can be effective in the case of the person charged. It appears to me to be clear that this must be the origin of the right in felony; and that, being derived from the common law, it ought, *prima facie* at least, to be deemed to exist in all cases in which that interest of the State exists, and can not (at least without express authority) be so confined as to be inapplicable in cases of custodies of such value in the eyes of the law as to justify, for their preservation, the taking of life.

The opinion thereupon proceeds to show that no sound reason exists why the rule thus applicable to felonies should not apply to misdemeanors as well, and concludes that the rule is applicable to both alike.

It is to be observed that the evidence seized in the foregoing case was not taken from the person of the one arrested, but was found "in said house and room." It will further be noted that the articles taken were not of such an inherent nature that they could not lawfully be possessed by anyone; in other words, they were not "contraband," such as counterfeit dies, gambling devices, burglars' tools, and the like, which the Government has the right to seize, no matter where or by whom possessed. It is true that, in view of the uncontroverted averment of the defense, that the articles

were being used at the time in the commission of the crime for which the plaintiff was arrested, the court declared that its decision was confined to a case of that character. Nevertheless, the ground upon which the seizure was upheld was of much broader scope. It was that officers are entitled upon making lawful arrest of one charged with crime "to take and detain property found in his possession which will form material evidence in his prosecution for that crime." Moreover, the principle of the common law to which the court referred as the basis of the rule was not restricted to any particular kind of property found in the possession of the prisoner, provided only that it was material evidence to establish the crime. The case has been repeatedly cited as having that effect. In the *Chiagles case,* heretofore cited, where the articles seized were letters of evidentiary value only, the Court of Appeals of New York cited *Dillon* v. *O'Brien,* as well as *Weeks* v. *United States,* 232 U. S. 383, 392, and many other cases, as authority for the right of the arresting officer to search the prisoner and seize mere evidences of crime. See also *Carroll* v. *United States,* 267 U. S. 132, 158.

When, therefore, it is borne in mind that in the instant case there was no search whatever for the books and papers seized by the arresting officers, and that those articles incidentally came to the officers' attention while they were conducting a lawful and orderly search for contraband, it is submitted,

both upon reason and authority, that the taking of said documents, considering them as evidence only, can not be regarded as constituting an unreasonable seizure within the Fourth Amendment.

(C) THE GRAY LEDGER WAS SUBJECT TO SEIZURE AS AN INSTRUMENTALITY OR MEANS USED IN COMMITTING THE OFFENSE

Whether or not as an incident of a lawful arrest property found within the control of the offender and of evidentiary value only may be lawfully seized, there can be no question that if the property thus found was used as an instrumentality or means for committing the offense it is a proper subject of seizure. *Agnello* v. *United States,* 269 U. S. 20, 30. The gray ledger involved in this case comes within the latter description. It was used by the defendants for recording the payments made for liquor purchased, the quantities of liquor delivered, the sums received for liquor sold, "gifts" made to the city police, the shares of the net proceeds due the respective "partners," the amounts withdrawn by them, and the wages paid to various persons employed in and about the place where the intoxicating liquor was possessed, kept for sale, and sold in violation of the National Prohibition Act. (R. 126–131.) Whether it would have been possible for the defendants to carry on their illegal enterprise without keeping some such record of their transactions is, to say the least, doubtful. In a conspiracy the

essence of the offense is the formation of the partnership relation in the commission of crime. Those necessary partnership accounts, therefore, which perpetuate this unlawful agreement are not merely evidence. They are actual means of commission or perpetuation of the offense itself. This the gray ledger was. These seven defendants could have all been together every day making common cause of their unlawful agreement to keep the nuisance in question. In that event, they would have sat around a common board dividing spoils, paying bills, and arranging for the purchase of liquor. That would have been an unnatural "means of committing the offense." The natural way, and the one used here, was to substitute for these meetings where all would have been present and participating, the keeping of a book of account recording their unlawful agreements as to the details of the conspiracy. The importance attached by the conspirators to the keeping of the book here involved is evidenced by the fact that they had it regularly audited by an accountant. (R. 141–154.)

Of somewhat similar books the Supreme Judicial Court of Massachusetts in *Commonwealth* v. *Dana*, 2 Metc. 329, 337, said:

> It has been objected further, that the warrant was illegally served, because the officer seized "books, etc.," and it is argued that books are not "materials for a lottery." But we think that books, kept in relation to the

> proceedings respecting a lottery, are to be considered as materials for a lottery; and it does not appear that any other books were seized.

In *United States* v. *Kraus* (S. D., N. Y.), 270 Fed. 578, the defendant as a wholesale liquor dealer was required by Section 3318 of the Revised Statutes, under pain of punishment as for a felony, to keep a record of his purchases and sales of distilled spirits in books prescribed by the Commissioner of Internal Revenue. He failed to make the proper entries in such books, but kept a separate record of his liquor purchases and sales. Upon the question of whether this latter record was subject to seizure under the search warrant provisions of the Espionage Act authorizing a seizure of "property used as means of committing a felony," the court, referring to the books required by Section 3318, said (p. 582–583):

> It must be owned that the case is not so clear as to evidences of sales and purchases that should have been transcribed into such books but were not. Yet it appears to me that documentary records used in the business, but not transcribed, are means used to avoid keeping the books, which is the crime itself. They become necessary, or at least convenient, in evading those entries which should be made. Therefore I hold that, when the books required under section 3318 are not kept or are kept insufficiently, all docu-

> ments showing transactions which should be so recorded may be seized on search warrant under the pertinent provisions of the Espionage Act.

As in the instant case the defendant's business was itself a violation of the law prohibiting the maintenance of a common nuisance, it is plain that the keeping of the gray ledger was fully as much a means of committing that offense as was the keeping of the separate record in the *Kraus case* a means of violating Section 3318.

A like decision was rendered in *State* v. *Mausert,* 88 N. J. L. 286. In that case the defendant, charged with keeping a disorderly house, was arrested upon a warrant in the office of his hotel. At the time of the arrest the officer seized the hotel register and cashbook which were on a near-by counter. Holding that these books were properly seized and admitted in evidence against the defendant, the court said (p. 290):

> These books were in actual use as a means of carrying on the unlawful business, and were as much in defendant's possession and under his control when arrested as if he had them under his arm and dropped them to the floor. It is not a case where papers were secreted and intended to be kept private, nor of requiring the production of papers of like character, but rather the taking of evidence of a crime then being committed, in the commission of which the books were a useful ele-

ment. There was no unreasonable search and seizure of incriminating evidence within the constitutional prohibition.

The cases cited show clearly, if authority to establish the point be needed, that the ledger kept by the defendants was a means used by them in committing the offense for which the arrest was made upon the premises, and that said book was accordingly a proper subject of seizure.

As regards the gas, water, telephone, etc., bills, the Government does not argue, as in the case of the ledger, that they constituted a means used by the defendants in committing the offense. It does respectfully urge, however, that as the papers in question identified the petitioner as the proprietor of the premises and tended, therefore, to show that he was a party to the offense committed thereon, they were, for the reasons given in subdivision (B) of this brief, properly received in evidence. But even if their admission in evidence was erroneous, petitioner's connection with the premises and with the offense committed thereon was so abundantly proved by other testimony at the trial (R. 156–159, 160–161, 162, 164, 192–193), that the error could in no way result to his prejudice.

CONCLUSION

It is submitted that the court below correctly held that no violation of petitioner's rights under the Fourth and Fifth Amendments resulted from

the seizure and use in evidence of the ledger and other papers complained of by petitioner and that its judgment should accordingly be affirmed.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

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Assistant Attorney General.

JOHN J. BYRNE,
Attorney.

OCTOBER, 1927.

O

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 185

JOSEPH E. MARRON, PETITIONER,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

PETITION FOR CERTIORARI FILED FEBRUARY 24, 1937.

CERTIORARI GRANTED APRIL 5, 1937.

(32,497)

(32,497)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 185

JOSEPH E. MARRON, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 15,708.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOSEPH E. MARRON,
Defendant.

PRAECIPE FOR TRANSCRIPT OF RECORD ON WRIT OF ERROR.

To the Clerk of the Above-entitled Court:

Please prepare certified transcript on writs of error of Joseph E. Marron of the following pleadings, papers and orders:

Indictment.
Verdict of the jury.
Motions and arrest of judgment.

Motions for new trial.
Sentence of judgment.
Bill of exceptions as settled by trial Judge.
Petition for writ of error of Joseph E. Marron.
Order allowing writ of error for Joseph E. Marron.
Asignment of errors of Joseph E. Marron.
Bond of costs of Joseph E. Marron.
Writ of Error on behalf of Joseph E. Marron.
Citation on writ of error on behalf of Joseph E. Marron.
Praecipe for certified transcript.
Supersedeas bond on behalf of Joseph E. Marron.
Petition for return of property and to suppress evidence (Motion A).
Petition for return of property and to suppress evidence (Motion B).
Petition for return of property and to suppress
[1*] evidence (Motion D).
Order for transfer of original exhibits.

Dated: August 7, 1926.

CHAS. J. WISEMAN,
HUGH L. SMITH,
Attorneys for Defendant.

[Endorsed]: Filed Aug. 7, 1926. [2]

*Page-number appearing at the foot of page of original certified Transcript of Record.

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 15,708.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE HAWKINS, WALTER BRAND, JOSEPH E. MARRON, *alias* EDDIE MARRON, GEORGE BIRDSALL, *alias* GEORGE HOWARD, CHARLES MAHONEY, PATRICK KISSANE and JOSEPH GORHAM,

Defendants.

INDICTMENT.

At a stated term of said court begun and holden in the City and County of San Francisco within and for the Southern Division of the Northern District of California on the second Monday in July in the year of our Lord one thousand nine hundred and twenty-four—

The Grand Jurors of the United States of America within and for the Southern Division of the Northern District of California on their oaths do allege, find, charge and present:

I.

That heretofore, to wit, on the 28th day of October, 1919, the Congress of the United States of America passed an Act entitled "An Act to Pro-

hibit intoxicating beverages and to regulate the manufacture, production, use and sale of high-proof spirits for other than beverage purposes, and to insure an ample supply of alcohol and promote its use in scientific research and in the development of fuel, dye, and other lawful industries," the short title of which is "National Prohibition Act," and which said Act at all of the times hereinafter mentioned was and is now in full force and effect. [3]

II.

That under and pursuant to the provisions of the said Act the Commissioner of Internal Revenue of the United States of America, with the approval of the Secretary of the Treasury of the United States, was and is authorized and empowered to make and prescribe regulations for carrying out the provisions of the said Act.

III.

That the said Commissioner, with the approval of the said Secretary, heretofore, and on or about the 16th day of January, 1920, did make, prescribe and promulgate regulations entitled "Regulations relative to the manufacture, sale, barter, transportation, importation, exportation, delivery, furnishing, purchase, possession, and use of intoxicating liquor," approved January 16, 1920.

IV.

And the said Commissioner, with the approval of the said Secretary, heretofore, and on or about the 1st day of July, 1920, did make, prescribe, and promulgate modifications of regulations 60 entitled

"Modification of Regulations No. 60 relative to the sale, use, transportation, delivery, and advertisement of intoxicating liquor," approved July 1, 1920.

V.

And the said Commissioner, under and pursuant to the authority conferred upon him by the said National Prohibition Act, as aforesaid, heretofore made, prescribed and promulgated records, applications for permits, permits, bonds, and forms to be used in and for the carrying out of the provisions of the said Act, and which said records, applications for permits, permits, bonds, and forms of and for each thereof respectively, were at all of the times herein mentioned required to be used in compliance with and in carrying out the provisions of the said act and said regulations, and at all of the times herein mentioned were in full force and effect. [4]

VI.

That under and pursuant to the provisions of said Act and particularly by Section 1 of Title II thereof is is provided:

"When used in Title II and Title III of this Act (1) The word 'liquor' or the phrase 'intoxicating liquor' shall be construed to include alcohol, brandy, whiskey, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt, or fermented liquor, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of 1 per centum or more of alcohol by volume which are

fit for use for beverage purposes; Provided, That the foregoing definition shall not extend to dealcoholized wine nor to any beverage or liquid produced by the process by which beer ale, porter or wine is produced if it contains less than one-half of 1 per centum of alcohol by volume, and is made as prescribed in section 37 of this title, and is otherwise denominated than as beer, ale, or porter, and is contained and sold in, or from, such sealed and labeled bottles, casks, or containers as the commissioner may by regulation prescribe.

(2) The word 'person' shall mean and include natural persons, associations, copartnerships, and corporations.

(3) The word 'commissioner' shall mean Commissioner of Internal Revenue.

(4) The term 'application' shall mean a formal written request supported by a verified statement of facts showing that the commissioner may grant the request.

(5) The term 'permit' shall mean a formal written authorization by the commissioner setting forth specifically therein the things that are authorized.

(6) The term 'bond' shall mean an obligation authorized or required by or under this Act or any regulation, executed in such form and for such a penal sum as may be required by a Court, the commissioner or prescribed by regulation.

(7) The term 'regulation' shall mean any regulation prescribed by the commissioner with the approval of the Secretary of the Treasury for carrying out the provisions of this Act, and the commissioner is authorized to make such regulations.

Any act authorized to be done by the commissioner may be performed by any assistant or agent designated by him for that purpose. Records required to be filed with the commissioner may be filed with an assistant commissioner or other person designated by the commissioner to receive such records."

VII.

That under and pursuant to the provisions of the said Act and particularly by section 3 of Title II thereof, it is [5] provided that:

"No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, manufacture, or sell, barter, transport, import, export, deliver, furnish, or possess any intoxicating liquor except as authorized in this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.

Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished and possessed, but only as herein provided, and the

commissioner may, upon application, issue permits therefor."

VIII.

That under and pursuant to the provisions of the said Act and particularly by section 6 of Title II thereof, it is provided that:

"No one shall manufacture, sell, purchase, transport, or prescribe any liquor without first obtaining a permit from the commissioner so to do, except that a person may, without a permit, purchase and use liquor for medicinal purposes when prescribed by a physician as herein provided, and except that any person who in the opinion of the commissioner is conducting a *bona fide* hospital or sanatorium engaged in the treatment of persons suffering from alcoholism, may, under such rules, regulations, and conditions as the commissioner shall prescribe, purchase and use, in accordance with the methods in use in such institution, liquor, to be administered to the patients of such institution under the direction of a duly qualified physician employed by such institution * * * Permits to purchase liquor shall specify the quantity and kind to be purchased and the purpose for which it is to be used. * * * No permit shall be issued to anyone to sell liquor at retail, unless the sale is to be made through a pharmacist designated in the permit and duly licensed under the laws of his state to compound and dispense medicine prescribed by a duly licensed physician.

* * * Every permit shall be in writing, dated when issued, and signed by the commissioner or his authorized agent. It shall give the name and address of the person to whom it is issued and shall designate and limit the acts that are permitted and the time when and place where such acts may be performed. No permit shall be issued until a verified, written application shall have been made thereof, setting forth the qualification of the applicant and the purpose for which the liquor is to be used.

"The commissioner may prescribe the form of all permits and applications and the facts to be set forth therein. Before any permit is granted the commissioner may require a bond in such form and amount as he may prescribe to insure compliance with the terms of the permit and the provisions of this title. * * *

[6]

"Nothing in this title shall be held to apply to the manufacture, sale, transportation, importation, possession, or distribution of wine for sacramental purposes, or like religious rites, except section 6 (save as the same requires a permit to purchase) and section 10 hereof, and the provisions of this Act prescribing penalties for the violation of either of said sections. No person to whom a permit may be issued to manufacture, transport, import, or sell wines for sacramental purposes or like religious rites, shall sell, barter, exchange, or furnish any such to any person not a rabbi, minister of the gos-

pel, priest, or an officer duly authorized for the purpose by any church or congregation, nor to any such except upon an application duly subscribed by him, which application, authenticated as regulations may prescribe, shall be filed and preserved by the seller."

And the said Commissioner heretofore pursuant to the authority conferred upon him by said National Prohibition Act, did prescribe the form of all permits and applications and the facts to be set forth therein and did require a bond and prescribe the form thereof and did fix the penal amount of said bond; and the said applications for a permit, the permits, the bond and the requirements thereof at all of the times herein mentioned were and are now in full force and effect.

IX.

That under and pursuant to the provisions of said Act and particularly by section 10 of Title II thereof, it is provided that:

"No person shall manufacture, purchase for sale, sell, or transport any liquor without making at the time a permanent record thereof, showing in detail the amount and kind of liquor manufactured, purchased, sold or transported, together with the names and addresses of the persons to whom sold, in case of sale, and the consignor and consignee in case of transportation, and the time and place of such manufacture, sale, or transportation. The commissioner may prescribe the form of such

record, which shall at all times be open to inspection as in this Act provided."

That the said commissioner did prescribe and promulgate the record and form of said record and which said records and forms thereof so prescribed and promulgated at all of the times herein mentioned were and are now required to be made and kept as provided by and in said Act and said section 10 of said Title II thereof, and as provided by and in said regulations. [7]

X.

That under and pursuant to the provisions of said Act and particularly by section 13 of Title II thereof, it is provided that:

"It shall be the duty of every carrier to make a record at the place of shipment of the receipt of any liquor transported, and he shall deliver liquor only to persons who present to the carrier a verified copy of a permit to purchase which shall be made a part of the carrier's permanent record at the office from which delivery is made.

The agent of the common carrier is hereby authorized to administer the oath to the consignee in verification of the copy of the permit presented, who, if not personally known to the agent, shall be identified before the delivery of the liquor to him. The name and address of the person identifying the consignee shall be included in the record."

XI.

That under and pursuant to the provisions of

said Act and particularly be section 14 of Title II thereof, it is provided that:

> "It shall be unlawful for a person to use or induce any carrier, or any agent or employee thereof, to carry or ship any package or receptacle containing liquor without notifying the carrier of the true nature and character of the shipment. No carrier shall transport nor shall any person receive liquor from a carrier unless there appears on the outside of the package containing such liquor the following information:
>
> Name and address of the consignor or seller, name and address of the consignee, kind and quantity of liquor contained therein, and number of the permit to purchase or ship the same, together with the name and address of the person using the permit."

XII.

That under and pursuant to the provisions of said Act and particularly by section 15 of Title II thereof, it is provided that:

> "It shall be unlawful for any consignee to accept or receive any package containing any liquor upon which appears a statement known to him to be false, or for any carrier or other person to consign, ship, transport, or deliver any such package, knowing such statement to be false." [8]

XIII.

That under and pursuant to the provisions of

said Act and particularly be section 16 of Title II thereof, it is provided that:

"It shall be unlawful to give to any carrier or any officer, agent, or person acting or assuming to act for such carrier an order requiring the delivery to any person of any liquor or package containing liquor consigned to, or purporting or claimed to be consigned to a person, when the purpose of the order is to enable any person not an actual *bona fide* consignee to obtain such liquor."

XIV.

That under and pursuant to the provisions of said Act and particularly by section 21 of Title II thereof, it is provided that:

"Any room, house, building, boat, vehicle, structure, or place where intoxicating liquor is manufactured, sold, kept, or bartered in violation of this Title, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance."

XV.

That under and pursuant to the provisions of the said Act and particularly by section 25 of Title II thereof, it is provided that:

"It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title or which has been so used, and no property rights shall exist in any such liquor or property. * * * "

XVI.

That under and pursuant to the provisions of the said Act and particularly by section 26 of Title II thereof, it is provided that:

> "When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors, found thereon being transported contrary to law. * * *"

[9]

XVII.

That under and pursuant to the provisions of the said Act and particularly be section 33 of Title II thereof, it is provided that:

> "After February 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor shall be *prima fazie* evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this title. * * *"

XVIII.

That by Paragraph I of said "Modifications of Regulations No. 60" it is provided that:

> "No person holding permit authorizing the sale of intoxicating liquor may ship or deliver liquor pursuant to permit to purchase (Form 1410) except

(a) To the permittee named in Form 1410, if personally known to the vendee, or identified by some reputable person, personally known to him;

(b) To a *bona fide* employee of such permittee who is personally known to the vendor to be such employee, or who is identified by some reputable person personally known to the vendor; or

(c) To a person holding permit to transport intoxicating liquor for transportation to the permittee named in such Form 1410, in accordance with Paragraph 10 hereof. In all cases of shipment or delivery of intoxicating liquor under authority or permit to purchase (Form 1410), the vendor must indicate on the copy of such form retained by him, as well as on the copy to be forwarded by him to the director, the name of the person to whom delivery was made, stating whether such person is the permittee named in Form 1410, or such permittee's employee, or a carrier holding permit to transport, in which case the number of the transportation permit must be shown. If identification is necessary under the conditions stated above, the name and address of the person identifying the one to whom delivery was made must also be shown on both copies of Form 1410."

XIX.

That by Paragraph 10 of said "Modifications of Regulations No. 60," it is provided that:

"No person holding a permit to transport intoxicating liquor may make delivery of any liquor transported by him, except at the point of destination indicated in Form 1410, covering the shipment, and to the consignee named in such form, or to the *bona fide* employee or *a* agent of such consignee authorized to accept delivery for him. No carrier may deliver any intoxicating liquor transported by him except upon the receipt of copy of Form 1410 covering the same, verified under oath, with exceptions only as stated in Section 87 of Regulations No. 60. Such copy of Form 1410 must be filed by the carrier at [10] the office from which delivery is made, and must bear notation thereon of the name of the person to whom delivery was made and, in the event of identification by some other person, the name and address of such other person. Carriers are also required to keep records at the point of shipment, covering all intoxicating liquor transported by them, as provided in Section 6 of Regulations No. 60."

XX.

That by Paragraph II of said "Modifications of Regulations No. 60," it is provided that:

"In order for any person holding a permit authorizing the procurement or delivery of intoxicating liquor, to be authorized to transport such liquor without the necessity of obtaining a permit to transport, within the contemplation of Section 83 of Regulations No. 60, it is neces-

sary that the transportation of such liquor be done by him personally, or by some person regularly and exclusively in his employ, and that the right to the possession of the vehicle used for such transportation be vested in such permittee."

XXI.

That by Section 1, Article I, of Regulations No. 60, it is provided that:

"(d) The words 'inside Commissioner' shall mean the Federal Prohibition Commissioner.

(a) The word 'Act' shall mean the Act of October 28, 1919.

(e) The word 'Director' or the phrase 'Federal Prohibition Director' shall mean the person having charge of the administration of Federal Prohibition in any State."

XXII.

That by Section 6 of Article III of said Regulations No. 60, it is provided that:

"All persons desiring to manufacture, sell, barter, transport, import, export, deliver, furnish, prescribe, purchase, possess or use intoxicating liquor, for the non-beverage purposes herein authorized, must procure permits therefor in the manner hereinafter prescribed, except that no permit is required to be obtained under these regulations by a person operating an industrial alcohol plant, or a person using liquor in the manufacture of denatured alcohol or rum, who has obtained permit under regula-

tions No. 60; by persons procuring liquor for medicinal purposes upon prescriptions of physicians holding permits to prescribe; by rabbis, ministers of the gospel, priests, or officials duly authorized for the purpose by a church or congregation to procure its use or furnish wines for sacramental purposes or like religious rites; by persons to whom wine is furnished by such rabbis, ministers of the gospel, [11] priests, or official for sacramental purposes, or like religious rites; or by persons owning warehouse certificates to cover possession of the distilled spirits covered thereby."

XXIII.

That by Section 8 of Article III of said Regulations 60, it is provided that:

"Persons desiring to procure any permit required by these regulations, other than permits to purchase, must submit applications for permit Form 1404, in triplicate, clearly setting forth all the data required by the regulations dealing with the particular class or classes into which they fall."

XXIV.

That by Section 14 of Article III of said Regulations 60, it is provided that:

"Where the same person operates several places of business for which he desires to obtain permits, a separate application must be filed and a separate permit procured covering each place of business, but only one bond need be filed covering all such places of business op-

erated by the same person within any one state."

XXV.

That by Section 15 of Article III of said Regulations 60, it is provided that:

"Every permit will clearly and specifically designate and limit the acts that are permitted, and the time when, and the place where, such acts may be permitted. All permits issued hereunder are non-transferable.

XXVI.

That by Section 20 of Article III of said Regulations 60, it is provided that:

"All persons desiring to obtain permits provided by these regulations (except as otherwise provided by Section 20) must at or before the time of filing application therefor, file with the Director a bond, in duplicate, on Form 1408, or Form 1409, to insure compliance with the provisions of this Act and these regulations, as well as to cover any taxes and penalties which may be imposed under the Internal Revenue Laws."

XXVII.

That by Section 54 of Article VIII of said Regulations 60, it is provided that: [12]

"Any person entitled to procure intoxicating liquor in accordance with the provisions of these regulations must, in order to obtain such liquor, secure permits to purchase on Form 1410 from the Director, and no person is authorized to furnish or deliver intoxicating li-

quor except upon receipt of permit to purchase, unless otherwise specifically provided in these regulations."

XXVIII.

That by Section 58 of Article IX of said Regulations 60, it is provided that:

"Any person who desires to obtain permit to sell intoxicating liquor in quantities of 5 wine gallons, or more, at the same time, for the non-beverage purposes authorized, should file application on Form 1404 as prescribed in Article III. In filing application for permit such person should specifically set forth the kind and maximum quantity of liquor to be sold at any one time, or in case a person is lawfully in the possession of intoxicating liquor, and desire to obtain a permit to sell the same, he should state in his application the amount and kind of liquor so possessed.

In all cases it must be stated that such liquor will be sold by him only in wholesale quantities. Permits will not be issued to deliver any intoxicating liquor, produced under authority of Article VI, for conversion into non-alcoholic beverages.

(a) Permits to sell intoxicating liquor in quantities of less than 5 wine gallons may be obtained only by retail druggists or pharmacists, as set out in Article XII, provided, however, that when a person is engaged in business as both a wholesale and retail druggist, he may obtain permit to sell intoxicating liquor

in both wholesale and retail quantities. All sales in retail quantities must be made through a pharmacist.

(b) Persons obtaining permits to deliver any intoxicating liquor in wholesale quantities may procure such liquors from other persons authorized to sell the same upon furnishing permits to purchase on Form 1410.

(c) Intoxicating liquor so procured by such persons may only be sold or furnished by them in wholesale quantities to other persons entitled to procure same, unless otherwise provided by the terms of the permit. Such dealers may furnish or deliver intoxicating liquor only upon receipt of permits to purchase, except in case of sacramental wines, where applications on Form 1412 are received, as hereinabove provided.

(e) All persons dealing in intoxicating liquor are required to keep record 52 and Supplementary Record 52, containing detailed entries, covering all receipts and deliveries of liquor by them, and to keep a permanent file, containing a copy of each permit to purchase, upon which deliveries of intoxicating liquor are made to or by them.

(f) All persons making sale of intoxicating liquor [13] in wholesale quantities are required to affix to the containers of such liquor a label, to be provided by them, bearing the following data:

(1) Name of manufacturer.

(2) Kind, quantity in wine gallons and proof contents.

(3) Name of seller.

(4) Date of sale.

(5) Name of purchaser.

(g) Such labels are subject to all the requirements of Article XVIII."

XXIX.

That by Section 80 of Article XV of said Regulations 60, it is provided that:

"All persons holding permits under these regulations to manufacture, sell, rectify, use or transport intoxicating liquor are authorized to possess intoxicating liquor, lawfully manufactured or procured by them, for the purpose and at the places designated in their respective permits.

(a) Intoxicating liquor may not be possessed by persons not holding permits under these regulations, or by persons holding such permits for other purposes, or at other places than authorized in their respective permits, except that intoxicating liquor lawfully procured by the owner thereof, prior to January 17, 1920, for beverage purposes may be possessed in the private dwelling of such owner, where the same is occupied by him solely as his residence or place of abode, without the necessity of holding a permit, provided, such liquor is for the use only for the personal consumption of such owner and his family residing

in such dwelling, and of his *bona fide* guests, when entertained by him therein."

XXX.

That by Section 83 of Article XVI of said Regulations 60, it is provided that:

"All permits authorizing the delivery or procurement of intoxicating liquor confer upon the permittee the right to have same transported by a carrier holding a permit to transport, or to transport such liquor by any method of delivery, from persons from whom he is authorized to receive such liquor or to persons to whom he is authorized to deliver the same at the place of business stated in the form of permit to purchase or application covering the shipment."

XXXI.

That by Section 84 of Article XVI of Regulations 60, it is provided that:

"Any person entitled to possess intoxicating liquor [14] for non-beverage purposes may have any liquor which he possesses, transported from one place of business to another place of business covered by a permit held by him:"

XXXII.

That by Section 87 of Article XVI of said Regulations, #60, it is provided that:

"Persons holding permits to transport intoxicating liquor are authorized to deliver liquor transported by them at the point of des-

tination only to the consignee named and only upon receipt from him of copy of form of permit to purchase, Form 1410, verified under oath."

XXXIII.

That by Section 88 of Article XVI of said Regulations 60, it is provided that:

"Every person holding a permit to transport intoxicating liquor is required to permanently file, at the point of destination in a file or binder separate from other records, a copy of each form of permit to purchase or application upon which liquor is delivered by him, upon which copy should be noted the date when the liquor was delivered, and, in cases where delivered to an agent of the consignee, the name and address of such agent."

XXXIV.

That the defendants herein and hereinafter named were not nor was either or any of them at the time of entering into the conspiracy, combination, confederation, and agreement hereinafter set out, or at any of the times herein mentioned a physician, druggist, pharmacist or engaged in conducting a *bona fide* hospital or sanitarium engaged in the treatment of persons suffering from alcoholism under the direction of a duly qualified physician, and that the said intoxicating liquor herein and hereinafter mentioned, to wit, whiskey, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes, was

not and would not be purchased, possessed or transported by said defendants herein, or by either or any of them, for sacramental purposes, or like religious rites, nor purchased, possessed, or transported by said defendants or either or any of them by prescription of physician holding permits to prescribe for medicinal purposes, nor were the said defendants herein and hereinafter named, or either or any of them at [15] any of the times herein mentioned conducting or operating under any permit, or at all conducting or operating any industrial alcohol plant or using any liquor in the manufacture of denatured alcohol or rum; that the said defendants, and each of them, at all of the times herein mentioned were persons who before purchasing, receiving, possessing or transporting any intoxicating liquor, as defined by said section 1 of Title II of said Act, were required to make application for, give a bond and secure a permit from the Commissioner of Internal Revenue so to do as provided by the said Act and said Regulations hereinbefore set out; and the said defendants had not, nor had either or any of them at any of the times herein in this indictment mentioned made any application, given any bond, or secured any permit to purchase, possess or transport said or any intoxicating liquor as defined by said Section 1 of said Title II of said Act; that the said defendants were not, nor was either or any of them exempt from making application, giving a bond and securing permits for the purpose, possession and transportation of intoxi-

cating liquor as required and provided by said Act and said Regulations.

XXXIV-(a).

And the Grand Jurors of the United States of America, within and for the Southern Division of the Northern District of California on their oaths do further allege, find, charge and present:

That the said defendant, JOSEPH GORHAM, was continuously throughout all of the time or times from and after the 1st day of March, 1924, and at all of the times thereafter, and herein mentioned, and particularly at the time or times of the commission and consummation of each and all of the overt acts in this indictment set forth, and up to and including the time of the filing of this indictment, then and there a duly and regularly qualified, appointed and acting sergeant of the Police Force of the City and County of San Francisco, State of California, then and there acting as such. [16]

XXXIV-(b).

And the Grand Jurors of the United States of America within and for the Southern Division of the Northern District of California on their oaths do further allege, find, charge and present:

That the said defendant, JOSEPH GORHAM, as such Sergeant of Police, was on or about the 1st day of March, 1924, and at all the times thereafter and herein mentioned, and particularly at the time or times of the commission and consummation of each and all of the overt acts in this indictment set forth, and up to and including the time of the filing

of this indictment duly and regularly assigned to and acting in the official capacity of his office as such Sergeant of Police in the Bush Street Station, Police District Number 5, in the City and County of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this court.

XXXIV-(c).

And the Grand jurors of the United States of America, within and for the Southern Division of the Northern District of California on their oaths do further allege, find, charge and present:

That the said defendant, PATRICK KISSANE, was continuously throughout all of the time or times from and after the 1st day of March, 1924, and at all of the times thereafter and herein mentioned, and particularly at the time or times of the commission and consummation of each and all of the overt acts in this indictment set forth, and up to and including the time of the filing of this indictment, then and there a duly and regularly qualified, appointed and acting police officer of the Police Force of the City and County of San Francisco, State of California, then and there acting as such. [17]

XXXIV-(d).

And the Grand Jurors of the United States of America, within and for the Southern Division of the Northern District of California on their oaths do further allege, find, charge and present:

That the said defendant, PATRICK KISSANE, as such police officer, was on or about the 1st day of March, 1924, and at all of the times thereafter and herein mentioned, and particularly at the time or times of the commission and consummation of each and all of the overt acts in this indictment set forth, and up to and including the time of the filing of this indictment, duly and regularly assigned to and acting in the official capacity of his office as such police officer in the Bush Street Station, Police District Number 5, in the City and County of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this court.

XXXV.

And the Grand Jurors of the United States of America, within and for the Southern Division of the Northern District of California on their oaths do further allege, find, charge and present: That GEORGE HAWKINS, WALTER BRAND, JOSEPH E. MARRON, *alias* EDDIE MARRON, GEORGE BIRDSALL, *alias* GEORGE HOWARD, CHARLES MAHONEY, PATRICK KISSANE, and JOSEPH GORHAM, hereinafter called the defendants, did at and in the City and County of San Francisco, Southern Division of the Northern District of California, and within the jurisdiction of this court on or about the 1st day of May, 1923, the real and exact date being to the said Grand Jurors unknown, and at all the times [18] thereafter up to and including the date of the filing of this indictment wilfully, unlawfully, feloniously and

knowingly conspire, combine, confederate and agree together and with divers other persons whose names are to these Grand Jurors and to this Grand Jury unknown, to commit the acts made offenses and crimes against the United States of America, that is to say, that the said defendants then and there being did then and there wilfully, unlawfully, feloniously and knowingly conspire, combine, confederate and agree together and with divers other persons whose names are to these Grand Jurors and to this Grand Jury unknown, with the intent to and for the purpose of;

(a) Wilfully, unlawfully, feloniously and knowingly manufacturing, selling, transporting, delivering, furnishing, and possession intoxicating liquor for beverage purposes, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes, in violation of Section 3 of Title II of the Act of October 28, 1919, known as the National Prohibition Act;

(b) Wilfully, unlawfully, feloniously and knowingly purchasing, transporting, possessing, furnishing and selling intoxicating liquor for beverage purposes, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes, without making any application therefor as required by the said National Prohibition Act or by said regulations and without first or at all obtaining a or any permit from the Commissioner of Internal Revenue so to do, in violation

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of Section 6 of Title II of the said National Prohibition Act and in violation of said Section 6 of Article III of said Regulations 60; [19]

(c) Wilfully, unlawfully, knowingly and feloniously maintain a common nuisance by keeping for sale and selling intoxicating liquor for beverage purposes, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for beverage purposes and in the building and place, to wit, 1249 Polk Street, in the City and County of San Francisco, in the Southern Division of the Northern District of the State of California, and within the jurisdiction of this Court in violation of said Section 21 of said Title II of the said National Prohibition Act.

(d) Wilfully, unlawfully, knowingly and feloniously maintain a common nuisance by keeping for sale and selling intoxicating liquor for beverage purposes, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for beverage purposes and in the building and place, to wit, 2031 Steiner Street, in the City and County of San Francisco, in the Southern Division of the Northern District of the State of California, and within the jurisdiction of this Court in violation of said Section 21 of said Title II of the said National Prohibition Act;

(e) Wilfully, unlawfully, knowingly and feloniously maintain a common nuisance by keeping for sale and selling intoxicating liquor for beverage

purposes, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for beverage purposes and in the building and place, to wit, 3047 California Street, in the City and County of San Francisco, in the Southern Division of the Northern District of the State of California, and within the jurisdiction of this court in violation of said Section 21 of said Title II of the said National Prohibition Act. [20]

(f) Wilfully, unlawfully, knowingly and feloniously maintain a common nuisance by keeping for sale and selling intoxicating liquor for beverage purposes, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for beverage purposes and in the building and place, to wit, 2922 Sacramento Street, in the City and County of San Francisco, in the Southern Division of the Northern District of the State of California, and within the jurisdiction of this court in violation of said Section 21 of said Title II of the said National Prohbition Act;

(g) Wilfully, unlawfully and knowingly selling intoxicating liquor for beverage purposes, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes, without giving a bond as required by the said National Prohibition Act and said Regulations 60;

(h) Wilfully, unlawfully and knowingly possessing for sale, transporting and selling intoxicating liquor, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes, at 1249 Polk Street, in the City and County of San Francisco, California, without making a permanent or any record thereof, in violation of Section 10 of Title II of the said National Prohibition Act;

(i) Wilfully, unlawfully and knowingly possessing for sale, transporting and selling intoxicating liquor, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes, at 2031 Steiner Street, in the City and County of San Francisco, California, without making a permanent or any record thereof, in violation of Section 10 of Title II of the said National Prohibition Act; [21]

(j) Wilfully, unlawfully and knowingly possessing for sale, transporting and selling intoxicating liquor, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes, at 3047 California Street, in the City and County of San Francisco, California, without making a permanent or any record thereof, in violation of Section 10 of Title II of the said National Prohibition Act;

(k) Wilfully, unlawfully and knowingly possessing for sale, transporting and selling intoxi-

ating liquor, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes, at 2922 Sacramento Street, in the City and County of San Francisco, California, without making a permanent or any record thereof, in violation of Section 10 of Title II of the said National Prohibition Act;

(l) Wilfully, unlawfully and knowingly selling and delivering intoxicating liquor, to wit, whiskey, wine, champagne, gine and beer, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes, at 1249 Polk Street, in the City and County of San Francisco, California, at wholesale without a permit to persons having no permit to purchase or receive said or any intoxicating liquor, in violation of said Section II of Title II of said National Prohibition Act;

(m) Wilfully, unlawfully and knowingly selling and delivering intoxicating liquor, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes at 2031 Steiner Street, in the City and County of San Francisco, California, at wholesale without a permit to persons having no permit to purchase or receive said or any intoxicating liquor, in violation of said Section II of Title II of said National Prohibition Act; [22]

(n) Wilfully, unlawfully and knowingly selling and delivering intoxicating liquor, to wit,

whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes at 3047 California Street, in the City and County of San Francisco, California, at wholesale without a permit to persons having no permit to purchase or receive said or any intoxicating liquor, in violation of said Section II of Title II of said National Prohibition Act;

(o) Wilfully, unlawfully and knowingly selling and delivering intoxicating liquor, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes at 2922 Sacramento Street, in the City and County of San Francisco, California, at wholesale without a permit to persons having no permit to purchase or receive said or any intoxicating liquor, in violation of said Section II of Title II of said National Prohibition Act;

(p) Wilfully, unlawfully and knowingly selling at wholesale in packages intoxicating liquor, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes, without attaching to the packages when sold, a label setting forth the kind and quantity of liquor contained therein, by whom manufactured, the date of sale and person to whom sold, in violation of Section 12 of Title II of said National Prohibition Act;

(q) Wilfully, unlawfully and knowingly giving to carriers orders requiring the delivery of packages of intoxicating liquor, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes and consigning said liquor to persons not the actual *bona fide* consignees for the purpose of and the [23] order being to obtain said liquor by persons not the actual *bona fide* consignees in violation of Section 16 of Title II of said National Prohibition Act;

(r) Wilfully, unlawfully and knowingly having and possessing intoxicating liquor, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes, for use in violation of Title II of said National Prohibition Act, to wit, for sale for beverage purposes without having a permit to sell said liquor for beverage purposes and for sale to persons who were required to have a permit to purchase but who had not and would not have any permit whatever to purchase said or any intoxicating liquor, in violation of said Section 21 of Title II of the National Prohibition Act;

(s) Wilfully, unlawfully and knowingly transporting and delivering intoxicating liquor, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes under permits to transport to a destination

and at a place other than indicated on said permits covering the shipment, in violation of said National Prohibition Act and in violation of Paragraph 10 of said "Modifications of Regulations 60" and in violation of Section 83 of Article XVI of said Regulations 60;

(t) Wilfully, unlawfully, and knowingly selling, furnishing and delivering intoxicating liquor, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes in quantities of five gallons and more to persons who would be, were and are required, under the said National Prohibition Act and said Regulations 60, to have permites to purchase, Form 1410, without [24] such persons being entitled to procure intoxicating liquor or having a or any permit to purchase any intoxicating liquor;

(u) Wilfully, unlawfully and knowingly dealing in intoxicating liquor, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes, without keeping Record 52 or Supplemental Record 52, or a permanent file, as required by said Subdivision (e) of Section 58 of said Article IX of said Regulation 60;

(v) Wilfully, unlawfully and knowingly selling intoxicating liquor, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes, at 1249 Polk Street, in

the City and County of San Francisco, California, in wholesale quantities without affixing to the containers of said liquor labels showing either the name of the manufacturer, kind, quantity in wine gallons and proof contents, name of seller, date of sale or name of purchaser, in violation of Section 12 of Title II of said National Prohibition Act and in violation of Subdivision (f) of Article IX of said Regulations 60;

(w) Wilfully, unlawfully and knowingly selling intoxicating liquor, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes, at 2031 Steiner Street, in the City and County of San Francisco, California, in wholesale quantities without affixing to the containers of said liquor labels showing either the name of the manufacturer, kind, quantity in wine gallons and proof contents, name of seller, date of sale or name of purchaser, in violation of Section 12 of Title II of said National Prohibition Act and in violation of subdivision (f) of Article IX of said Regulations 60;

[25]

(x) Wilfully, unlawfully and knowingly selling intoxicating liquor, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes, at 3047 California Street, in the City and County of San Francisco, California, in wholesale quantities without affixing to the containers of said liquor labels show-

ing either the name of the manufacturer, kind, quantity in wine gallons and proof contents, name of seller, date of sale or name of purchaser, in violation of Section 12 of Title II of said National Prohibition Act and in violation of Subdivision (f) of Article IX of said Regulations;

(y) Wilfully, unlawfully and knowingly selling intoxicating liquor, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes, at 2922 Sacramento Street, in the City and County of San Francisco, California, in wholesale quantities without affixing to the containers of said liquor labels showing either the name of the manufacturer, kind, quantity in wine gallons and proof contents, name of seller, date of sale or name of purchaser, in violation of Section 12 of Title II of said National Prohibition Act and in violation of Subdivision (f) of Article IX of said Regulations;

(z) Wilfully, unlawfully and knowingly possessing certain intoxicating liquor for sale for beverage purposes, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes, at 1249 Polk Street, in the City and County of San Francisco, California, without a permit therefor;

(aa) Wilfully, unlawfully and knowingly possessing certain intoxicating liquor for sale for beverage purposes, to wit, whiskey, wine, champagne,

gin and beer containing one-half [26] of one per centum and more of alcohol by volume and fit for use for beverage purposes, at 2031 Steiner Street, in the City and County of San Francisco, California, without a permit therefor;

(bb) Wilfully, unlawfully and knowingly possessing certain intoxicating liquor for sale for beverage purposes, to wit, whiskey, wine, champagne, gin and beer containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes, at 3047 California Street, in the City and County of San Francisco, California, without a permit therefor:

(c) Wilfully, unlawfully and knowingly possessing certain intoxicating liquor for sale for beverage purposes, to wit, whiskey, wine, champagne, gin and beer containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes, at 2922 Sacramento Street, in the City and County of San Francisco, California, without a permit therefor;

(dd) Wilfully, unlawfully and knowingly transporting to, possessing, using and selling intoxicatliquor, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes, at places other than designated in permits in violation of Section 33 of Title II of said National Prohibition Act and in violation of Section 80 and 80 (a) of Article XV of said Regulations 60;

(ee) Wilfully, unlawfully and knowingly securing permits to purchase and transport intoxicating liquor, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes, and thereunder to purchase said whiskey, wine, champagne, gin and beer, transport and divert the same to a place other than authorized and directed by said permits; in violation of Secs. 80 and 80 (a), Article XV of Regulations 60; [27]

(ff) Wilfully, unlawfully and knowingly transporting and causing to be transported intoxicating liquor, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes from 2031 Steiner Street, in the City and County of San Francisco, State of California, to 1249 Polk Street in the City and County of San Francisco, State of California, without a permit therefor;

(gg) Wilfully, unlawfuliy and knowingly transporting and causing to be transported intoxicating liquor, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes from 3047 California Street, in the City and County of San Francisco, State of California, to 1249 Polk Street, in the City and County of San Francisco, State of California, without a permit therefor;

(hh) Wilfully, unlawfully and knowingly transporting and causing to be transported intoxicating

liquor, to wit, whiskey, wine, champagne, gin and beer, containing one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes from 2922 Sacramento Street, in the City and County of San Francisco, State of California, to 1249 Polk Street, in the City and County of San Francisco, State of California, without a permit therefor.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further allege, charge, find and present:

That the said conspiracy, combination, confederation and agreement between the said defendants and said divers other persons whose names are to these Grand Jurors and to this Grand Jury unknown, was continuously throughout all the time from and after on or about the 1st day of May, 1923, and at all the times thereafter and herein mentioned, and particularly at the time and times of the commission and consummation of each and all of [28] the overt acts in this indictment set forth and up to and including the time of the filing of this indictment in existence and in course of execution.

AGAINST the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and provided.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further allege, charge, find and present:

1.

That in pursuance of the said conspiracy, combination, confederation and agreement herein in this indictment set out and to effect and accomplish the objects thereof, and with the intent and for the purpose of effecting and accomplishing the objects thereof, the said defendant, George Hawkins, on or about the 3d day of July, 1923, at 1249 Polk Street, in the City and County of San Francisco, State of California, then and there being, did then and there sell intoxicating liquor to wit, two (2) drinks of whiskey, containing more than one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes, to one S. J. Keveney, without a permit so to do.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further allege, charge, find and present:

2.

That in pursuance of the said conspiracy, combination, confederation and agreement herein in this indictment [29] set out and to effect and accomplish the objects thereof, and with the intent and for the purpose of effecting and accomplishing the objects thereof, the said defendant, Walter Brand, on or about the —— day of September, 1923, at 1249 Polk Street, in the City and County of San Francisco, State of California, then and there

)eing, did then and there sell intoxicating liquor, o wit, two (2) drinks of whiskey, containing more han one-half of one per centum and more of alco- ıol by volume and fit for use for beverage purposes, o one W. E. Bivens, without a permit so to do.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further allege, charge, find and present:

3.

That in pursuance of the said conspiracy, combination, confederation and agreement herein in this indictment set out and to effect and accomplish the objects thereof and with the intent and for the purpose of effecting and accomplishing the objects thereof, the said defendant, George Birdsall, *alias* George Howard, on or about the —— day of November, 1923, at 1249 Polk Street, in the City and County of San Francisco, State of California, then and there being, did then and there sell intoxicating liquor, to wit, two (2) drinks of whiskey, containing more than one-half of one per centum and more of alcohol by volume and fit for use for beverage purposes, to one Rudolph Herring, without a permit so to do.

AGAINST the peace and dignity of the United [30] States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further allege, charge, find and present:

4.

That in pursuance of the said conspiracy, combination, confederation and agreement herein in this indictment set out and to effect and accomplish the objects thereof and with the intent and for the purpose of effecting and accomplishing the objects thereof, the said defendant, Joseph E. Marron, *alias* Eddie Marron, on or about the 15th day of May, 1924, at 1249 Polk Street, in the City and County of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this court, did then and there wilfully and unlawfully maintain a common nuisance and that the said defendant did then and there wilfully and unlawfully keep for sale on the premises aforesaid certain intoxicating liquor, to wit, whiskey, wine, champagne, gin and beer, the exact amount being to these Grand Jurors and to this Grand Jury unknown, and then and there containing one-half of one per centum and more of alcohol by volume, which was then and there fit for use for beverage purposes.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further allege, charge, find and present:

5.

That in pursuance of the said conspiracy, combination, confederation and agreement herein in this indictment set out and to effect and accomplish the objects thereof and with the intent and for the purpose of effecting and accomplishing the objects thereof, the said defendant, George Birdsall, *alias* George Howard, on or about the 15th day of May, 1924, at 1249 Polk [31] Street, in the City and County of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this court, did then and there wilfully and unlawfully maintain a common nuisance and that the said defendant did then and there wilfully and unlawfully keep for sale on the premises aforesaid certain intoxicating liquor, to wit, whiskey, wine, champagne, gin and beer, the exact amount being to these Grand Jurors and to this Grand Jury unknown, and then and there containing one-half of one per centum and more of alcohol by volume, which was then and there fit for use for beverage purposes.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further allege, charge, find and present:

6.

That in pursuance of the said conspiracy, combination, confederation and agreement herein in

this indictment set out and to effect and accomplish the objects thereof and with the intent and for the purpose of effecting and accomplishing the objects thereof, the said defendant, Charles Mahoney, on or about the 2d day of October, 1924, at 1249 Polk Street, in the City and County of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this court, did then and there wilfully and unlawfully maintain a common nuisance and that the said defendant did then and there wilfully and unlawfully keep for sale on the premises aforesaid certain intoxicating liquor, to wit, whiskey, wine, champagne, gin and beer, the exact amount being to these Grand Jurors and to this Grand Jury unknown, and then and there containing one-half of one per centum and more of alcohol by volume, which was then and [32] there fit for use for beverage purposes.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further allege, charge, find and present:

7.

That in pursuance of the said conspiracy, combination, confederation and agreement herein in this indictment set out and to effect and accomplish the objects thereof and with the intent and for the purpose of effecting and accomplishing the objects thereof, the said defendant, Patrick Kissane, then

and there being a duly and regularly qualified, appointed and acting police officer of the Police Force in the City and County of San Francisco, California, did, on or about the 17th day of November, 1923, at 1249 Polk Street, in the City and County of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this court, receive as such police officer from said defendant George Birdsall, *alias* George Howard, the sum of Five (5.00) Dollars, lawful money of the United States of America.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further allege, charge, find and present:

8.

That in pursuance of the said conspiracy, combination, confederation and agreement herein in this indictment set out [33] and to effect and accomplish the objects thereof and with the intent and for the purpose of effecting and accomplishing the objects thereof, the said defendant, Joseph Gorham, then and there being a duly and regularly qualified, appointed and acting police officer of the Police Force in the City and County of San Francisco, California, did, on or about the 31st day of March, 1924, at 1249 Polk Street, in the City and County of San Francisco, in the Southern Division of the Northern District of California, and within

the jurisdiction of this court, receive, as such police officer, from said defendant, George Birdsall, *alias* George Howard, the sum of Ninety (90.00) Dollars, lawful money of the United States of America.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further allege, charge, find and present:

9.

That in pursuance of the said conspiracy, combination, confederation and agreement herein in this indictment set out and to effect and accomplish the objects thereof and with the intent and for the purpose of effecting and accomplishing the objects thereof, the said defendant, Joseph E. Marron, *alias* Eddie Marron, did on or about the 24th day of April, 1923, at 2031 Steiner Street, in the City and County of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this court, then and there wilfully and unlawfully possess certain intoxicating liquors, to wit, whiskey, wine, champagne, gin and beer, the exact amount being to these Grand Jurors and to this Grand Jury unknown, and then and there containing one-half of one per centum and more of alcohol by volume, which was then and there fit for use for beverage purposes. [34]

AGAINST the peace and dignity of te United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further allege, charge, find and present:

10.

That in pursuance of the said conspiracy, combination, confederation and agreement herein in this indictment set out and to effect and accomplish the objects thereof and with the intent and for the purpose of effecting and accomplishing the objects thereof, the said defendant, Joseph E. Marron, *alias* Eddie Marron, did, on or about the 26th day of August, 1924, at 3047 California Street, in the City and County of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this court, then and there wilfully and unlawfully possess certain intoxicating liquors, to wit, whiskey, wine, champagne, gin and beer, the exact amount being to these Grand Jurors and to this Grand Jury unknown, and then and there containing one-half of one per centum and more of alcohol by volume, which was then and there fit for use for beverage purposes.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further allege, charge, find and present:

11.

That in pursuance of the said conspiracy, combination, confederation and agreement herein in this indictment set out and to effect and accomplish the objects thereof and with the intent and for the purpose of effecting and accomplishing the objects thereof, the said defendant, Joseph E. Marron, *alias* [35] Eddie Marron, did, on or about the 3d day of September, 1924, at 2922 Sacramento Street, in the City and County of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this court, then and there wilfully and unlawfully possess certain intoxicating liquors, to wit, whiskey, wine, champagne, gin and beer, the exact amount being to these Grand Jurors and to this Grand Jury unknown, and then and there containing one-half of one per centum and more of alcohol by volume, which was then and there fit for use for beverage purposes.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

Dated: October 17, 1924.

STERLING CARR,
United States Attorney.

A true bill.

PERRY EYRE,
Foreman.

[Endorsed]: Presented in open court and ordered filed Oct. 17, 1924. [36]

[Title of Court and Cause.]

PETITION FOR RETURN OF PROPERTY AND TO SUPPRESS EVIDENCE (MOTION "A").

To the Honorable JOHN S. PARTRIDGE, Judge of the District Court of the United States in and for the Northern District of California;

The petition of Joseph E. Marron respectfully shows:

I.

That at all of the times herein mentioned, Samuel Rutter was the duly qualified and acting Prohibition Director of the State of California.

II.

That on or about the 2d day of October, 1924, a Federal Prohibition Agent, acting under and pursuant to the authority of the said Samuel Rutter, made and executed an affidavit, a copy of which is hereto attached and made a part hereof, marked Exhibit "A," which said affidavit prayed that a search-warrant be issued to search the premises commonly known and designated as No. 1249 Polk Street, in the City and County of San Francisco, State of California. [37]

III.

That on or about the said 2d day of October, 1924, Albert M. Hardie, a United States Commissioner

in and for the Northern District of California, issued a purported search-warrant to search said premises described as aforesaid, a copy of which said search-warrant is hereto attached, made a part hereof, and marked Exhibit "B."

IV.

That on or about the said 2d day of October, 1924, pursuant to the authority conferred upon them in said search-warrant, the said Samuel Rutter, through F. W. Whittier and other Federal Prohibition Agents whose names are unknown to your petitioner, entered the said premises known as No. 1249 Polk Street, in the said City and County of San Francisco, State of California, and seized and carried away therefrom certain personal property, to wit, certain papers, records, books of account and ledgers, which were and are the private and personal property of your petitioner.

V.

That your petitioner, Joseph E. Marron, was, on said 2d day of October, 1924, and at all of the times herein mentioned, the lessee and occupant of the premises known as No. 1249 Polk Street, San Francisco, California.

VI.

That said search and said seizure, as aforesaid, was and is in direct violation of your petitioner's constitutional rights under the Fourth and Fifth Amendments to the Constitution of the United States of America, for the following reasons, to wit: [38]

a. The seizure of the said papers, records, books of account and ledgers, was done in contravention of the rights of your petitioner under the Fourth Amendment to the Constitution of the United States of America, for the reason that said papers, records, books of account and ledger were not particularly described in the search-warrant as things to be seized, as required by the said amendment.

b. The said papers, records, books of account and ledger were not instruments or fruits of crime, but on the contrary were and are the private memoranda, the private property and the private papers, documents and writings of your petitioner.

c. The said purported search-warrant only authorizes the said Federal Prohibition Agents, as aforesaid, to search the said premises, as aforesaid, for the following described personal property, to wit:

> Intoxicating liquors, to wit, alcohol, brandy, wine, whiskey, rum, gin, beer, ale, porter, sherry wine, port wine, jackass brandy, corn whiskey, wine of pepsin, neuropin, pepsin rennin fermented grape juice and spirituous, vinous, malt and fermented liquors, liquids and compounds by whatever name called containing one-half of one per centum or more of alcohol and fit for use for beverage purposes, stills, worms, coils, mashes, goosenecks, hydrometers, essences, caramel, coloring materials, boilers.

d. The said Federal Prohibition Agents, above referred to, were at the time of executing the warrant, as aforesaid, unlawfully upon the premises and were at said time and said place trespassers in

taking the said papers, records, books of account and ledger.

e. The said papers, records, books of account and [39] ledger were not upon the person of your petitioner, but on the contrary, were located in the said premises hereinabove referred to.

f. There was neither identification of the said papers, records, books of account and ledger, nor probable cause alleged in the affidavit marked Exhibit "A" in this petition, for the seizure of the papers, records, books of account and ledger, and that their taking was illegal and void.

VII.

That your petitioner is informed and believes and therefore alleges that the United States Government proposes to and will, unless restrained by this Honorable Court, use said personal property seized as aforesaid, as evidence against your petitioner in the trial of the above-entitled action.

WHEREFORE your petitioner prays that an order be made forthwith directing the return of said personal property hereinabove described and set forth, and that all matters pertaining thereto, and all things or matters discovered as a result of the entries of private matter contained therein be excluded as evidence.

JOSEPH E. MARRON,
Petitioner.
CHAS. J. WISEMAN, and
HUGH L. SMITH,
Attorneys for Petitioner. [40]

State of California,
City and County of San Francisco,—ss.

Joseph E. Marron, being first duly sworn, deposes and says: That he is the petitioner in the above and foregoing petition for return of property and to suppress evidence; that he has read said petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to those matters, he believes it to be true.

[Seal] JOSEPH E. MARRON.

Subscribed and sworn to before me this 16th day of April, 1926.

[Seal] JOHN WISNOM,
Notary Public in and for the City and County of San Francisco, State of California. [41]

EXHIBIT "A."

United States of America,
Northern District of California,
County of Alameda,—ss.

On this 1st day of Oct., 1924, before me, Albert M. Hardie, a United States Commissioner in and for the Northern District of California, personally appeared C. A. Howard, who being first duly sworn, deposes and says:

That he is and at all of the times herein mentioned was a Federal Prohibition Agent, and as such makes this affidavit and presents the facts and circumstances hereinafter set out that heretofore came

to the personal knowledge of and as positively known to affiant to exist. That this affidavit is made for the purpose of having issued hereon and hereunder a search-warrant to search the following-described premises and place, to wit:

1249 Polk Street, San Francisco, Cal., including the entire second floor, flat or club, all rooms, lockers, closets, safes, shelves, sheds, drawers, basement, attic, pantries, cupboards, ice-boxes. Entire premises name of owner, or occupant, Eddie Marron.

That in and upon the aforesaid premises and place and on or about the 22d day of September, 1924, intoxicating liquors as defined by Section 1 of Title II of the Act of October 28, 1919, known as the National Prohibition Act, containing one-half of one per centum or more of alcohol by volume and fit for use for beverage purposes, was then and there and now are kept, sold, possessed and bartered in violation of Title II of said National Prohibition Act, and particularly in violation of Sections 3 and 21 of said Title II.

That affiant on or about the 22d day of September, 1924, visited the above and foregoing mentioned and [42] described premises and purchased from the person in charge in said premises certain intoxicating liquor, to wit, fifteen drinks of Bourbon Whiskey, for which he paid fifty cents each; description of person in charge of premises; height 5 ft. 7 in.; weight about 165 lbs.; age 47 yrs.; large nose, deep set eyes; slightly gray hair, high cheek bones; male. That it will be necessary to enter the said premises and place to search the same and every part thereof

in order to secure the said intoxicating liquors therein for the United States Government and that it will be impossible to secure the same or any part thereof without the aid and use of a search-warrant.

WHEREFORE, affiant applies for and prays that a search-warrant to enter the said premises and place and therein to search for the said intoxicating liquor be issued pursuant to the statute in such cases made and provided.

C. A. HOWARD.

Subscribed and sworn to before me this 1st day of October, 1924.

ALBERT M. HARDIE,
United States Commissioner in and for the Northern District of California. [43]

EXHIBIT "B."

To the Federal Prohibition Director in and for the State of California, and to This Assistants, Agents and Inspectors, and Any or Either of Them, GREETING:

WHEREAS, C. A. HOWARD, a Federal Prohibition Agent, was as such Agent on the 1st day of Oct., 1924, by me, Albert M. Hardie, as United States Commissioner in and for the Northern District of California, at Oakland, California, first duly sworn, and by me as such Commissioner examined, on his oath, as to all the facts and circumstances personally known to said Agent, respecting the violations of the Act of October 28, 1919, known as the "National Prohibition Act" and referred to in the affidavit hereto attached; and

WHEREAS, the said Agent thereafter and heretofore, to wit, on the said last-mentioned date made and filed with me as such Commissioner his affidavit, which said affidavit is hereto attached marked Exhibit "A" and by reference made a part hereof to all intents and purposes the same as if herein in this warrant set out in full; and

WHEREAS, the said examination and affidavit was had and made for the purpose of having issued thereunder and thereon a search-warrant to search the premises described in said affidavit for the property mentioned and described therein; and

WHEREAS, from the said examination and facts set out in said affidavit, I, ALBERT M. HARDIE, as such Commissioner, being thereupon and therefrom satisfied of the existence of the grounds of the application and that there is probable cause to believe that the grounds of and upon which the application is based, do exist, I find that there is probable cause for the issuance of this warrant; that the particular grounds [44] and probable cause for the issuance of this search-warrant are the facts and circumstances set out in the affidavit of C. A. HOWARD hereto attached and made a part hereof as hereinabove set out.

NOW, THEREFORE, pursuant to Section 25 of Title II of the said National Prohibition Act, you are hereby authorized and empowered to enter the premises and place mentioned, referred to and described in said affidavit, and every part thereof, in the day or night time and to thoroughly search the same for the following-described property, to wit:

intoxicating liquors, to wit, alcohol (jackass brandy, corn whiskey, wine of pepsin, neuropin, pepsin rennin, fermented grape juice), brandy, wine, whiskey, rum, gin, beer, ale, porter, sherry wine, port wine, and spirituous, vinous, malt and fermented liquors, liquids, and compounds by whatever name called containing one-half of one per centum or more of alcohol and fit for use for beverage purposes, stills, worms, coils, mashes, goosenecks, hydrometers, essences, caramel, coloring materials, boilers, and if found to seize the same and take it into your possession to the end that the said property may be thereafter dealt with according to law, and hereof to make due return with written inventory of the property taken by you or any or either of you within ten days as required by law.

WITNESS my hand and official seal this 1st day of October, 1924.

ALBERT M. HARDIE,
United States Commissioner in and for the Northern District of California.

Receipt of a copy of the within petition is hereby admitted this 16th day of April, 1926, and it is stipulated that same may be heard on April 19, 1926.

EDGAR R. BONSALL,
Asst. U. S. Atty.,
Attorney for Plaintiff.

[Endorsed]: File Apr. 17, 1926. [45]

[Title of Court and Cause.]

PETITION FOR RETURN OF PROPERTY AND TO SUPPRESS EVIDENCE (MOTION "B").

To the Honorable District Court of the United States, in and for the Northern District of California:

The petition of Joseph E. Marron respectfully shows:

I.

That at all of the times herein mentioned Samuel Rutter was duly qualified and acting Prohibition Director of the State of California.

II.

That on or about the 2d day of October, 1924, a Federal Prohibition Agent, acting under and pursuant to the authority of the said Samuel Rutter, made and executed an affidavit a copy of which is hereto attached and made a part hereof marked Exhibit "A," which said affidavit prayed that a search-warrant be issued to search the premises commonly known and designated as No. 1249 Polk Street, in the City and County of San Francisco, State of California.

III.

That on or about the said 2d day of October, 1924, Albert M. Hardie, a United States Commissioner in and for [46] the Northern District of California, issued a purported search-warrant to search said premises described as aforesaid, a copy of

which said search-warrant is hereto attached, made a part hereof and marked Exhibit "B."

IV.

That on the 2d day of October, 1924, Samuel Rutter, as the duly qualified and acting Prohibition Director for the State of California, through his agent W. F. Whittier, and other prohibition agents, whose names are unknown to your petitioner, entered the premises known as No. 1249 Polk Street, San Francisco, California, and carried away therefrom certain personal property, including, among other things, certain papers, records and books of account, which said papers, records and books of account are the private and personal property of your petitioner, Joseph E. Marron; that at the time of said seizure of said personal property, said prohibition agents were acting upon what purported to be a search-warrant lawfully issued, authorizing the search of said premises for certain specified and described property, which did not include the papers, records and account-books, hereinabove described.

V.

That said purported search-warrant only authorized the said prohibition agents to search the said premises for the following-described property, to wit:

> Intoxicating liquors, to wit, alcohol, brandy, wine, whiskey, rum, gin, beer, ale, porter, sherry wine, port wine, jackass brandy, corn whiskey, wine of pepsin, neuropin, pepsin rennin, fermented grape juice and spirituous, vinous, malt

and fermented liquors, liquids and compounds by whatever name called containing one-half of one per centum or more of alcohol and fit [47] for use for beverage purposes, stills, worms, coils, mashes, goosenecks, hydrometers, essences, caramel, coloring materials, boilers,

That the said seizure by the said prohibition agents of that portion of the personal property seized on said 2d day of October, 1924, to wit, said papers, records, and books of account, was unlawful, unreasonable and unwarranted and when said prohibition agents seized said property they became trespassers *ab initio* on said premises of *you* petitioner, Joseph E. Marron, and therefore the seizure of the personal property authorized to be seized under and by virtue of said purported search-warrant became unlawful.

VI.

That said search and said seizure, as aforesaid, was and is in the direct violation of your petitioner's constitutional rights under the Fourth and Fifth Amendments to the Constitution of the United States of America, for the following reasons, to wit:

a. The seizure of the said papers, records, books of account and ledgers, was done in contravention of the rights of your petitioner under the Fourth Amendment to the Constitution of the United States of America, for the reason that said papers, records, books of account and ledger were not particularly described in the search-warrant as things to be seized, as required by the said amendment.

b. The said papers, records, books of account and ledger were not instruments or fruits of crime, but, on the contrary, were and are the private memoranda, the private property and the private papers, documents and writings of your petitioner.

c. The said purported search-warrant only authorizes the said Federal Prohibition Agents, as aforesaid, to search the said premises as aforesaid, for the following described [48] personal property, to wit:

> Intoxicating liquor, to wit, alcohol, brandy, wine, whiskey, rum, gin, beer, ale, porter, sherry wine, port wine, jackass brandy, corn whiskey wine of pepsin, neuropin, pepsin rennin, fermented grape juice and spirituous, vinous, malt and fermented liquors, liquids, and compounds by whatever name called containing one-half of one per centum or more of alcohol and fit for use for beverage purposes, stills, worms, coils, mashes, goosenecks, hydrometers, essences, caramel, coloring materials, boilers.

d. The said Federal Prohibition Agents, above referred to, were at the time of executing the warrant, as aforesaid, unlawfully, upon the premises and were at said time and said place trespassers in taking the said papers, records, books of account and ledger.

e. The said papers, records, books of account and ledger were not upon the person of your petitioner, but, on the contrary, were located in the said premises hereinabove referred to.

f. There was neither identification of the said papers, records, books of account and ledger, nor probable cause alleged in the affidavit marked Exhibit "A" in this petition for the seizure of the papers, records, books of account and ledger, and that taking was illegal and void.

VII.

Petitioner is informed and believes, and therefore alleges, that the United States Government proposes to use said personal property as evidence against your petitioner in a conspiracy action now pending.

WHEREFORE, petitioner prays that an order be made [49] directing the return of said property seized on the 2d day of October, 1924, that all matters pertaining thereto and all things or matter discovered as a result thereof be suppressed as evidence.

JOSEPH E. MARRON,
Petitioner.
CHAS. J. SMITH,
HUGH L. SMITH,
Attorneys for Petitioner.

State of California,
City and County of San Francisco,—ss.

Joseph E. Marron, being first duly sworn, deposes and says: That he is the petitioner in the above and foregoing petition for return of property and to suppress evidence; that he has read said petition and knows the contents thereof; that the same is true of his own knowledge, except as

to the matters therein stated on information or belief, and as to those matters, he believes it to be true.

[Seal] JOSEPH E. MARRON,

Subscribed and sworn to before me this 16th day of April, 1926.

JOHN WISNOM,

Notary Public in and for the City and County of San Francisco, State of California. [50]

EXHIBIT "A."

United States of America,
Northern District of California,
County of Alameda,—ss.

On this 1st day of Oct., 1924, before me, Albert M. Hardie, a United States Commissioner in and for the Northern District of California, personally appeared C. A. Howard, who being first duly sworn, deposes and says:

That he is and at all of the times herein mentioned was a Federal Prohibition Agent and as such makes this affidavit and presents the facts and circumstances hereinafter set out that heretofore came to the personal knowledge of and as positively known to affiant to exist. That this affidavit is made for the purpose of having issued hereon and hereunder a search-warrant to search the following described premises and place, to wit:

1249 Polk St., San Francisco, Cal., including the entire second floor, flat or club, all rooms, lockers, closets, safes, shelves, sheds, drawers, basement,

attic, pantries, cupboards, ice-boxes. Entire premises, name of owner, or occupant, Eddie Marron.

That in and upon the aforesaid premises and place and on or about the 22d day of Sept. 1924, intoxicating liquors as defined by Section I of Title II of the Act of October 28, 1919, known as the National Prohibition Act, containing one-half of one per centum or more of alcohol by volume and fit for use for beverage purposes, was then and there and now are kept, sold, possessed and bartered in violation of Title II of the said National Prohibition Act, and particularly in violation of Section 3 and 21 of said Title II.

That affiant on or about the 22d day of September, 1924, visited the above and foregoing mentioned and described premises and purchased from the person in charge in said premises certain intoxicating liquor, to wit: Fifteen drinks of Bourbon whiskey for which he paid fifty cents each; [51] description of person in charge of premises; height, 5 ft. 7 in.; weight, about 165 lbs.; age 47 yrs.; large nose, deep set eyes; slightly gray hair, high cheeks bones; male. That it *will necessary* to enter the said premises and place to search the same and every part thereof in order to secure the said intoxicating liquor therein for the United States Government and that it will be impossible to secure the same or any part thereof without the aid and use of a search-warrant.

WHEREFORE, affiant applies for and prays that a search-warrant to enter the said premises and place and therein to search for the said intoxi-

cating liquor be issued pursuant to the statute in such cases made and provided.

C. A. HOWARD.

Subscribed and sworn to before me this 1st day of October, 1924.

ALBERT M. HARDIE,
United States Commissioner in and for the Northern District of California. [52]

EXHIBIT "B."

To the Federal Prohibition Director in and for the State of California, and to His Assistants, Agents and Inspectors and Any or Either of Them, GREETING:

WHEREAS, C. A. HOWARD, a Federal Prohibition Agent, was as such Agent on the 1st day of Oct., 1924, by me, Albert M. Hardie, as United States Commissioner in and for the Northern District of California, at Oakland, Californa, first duly sworn, and by me as such Commissioner examined on his oath as to all the facts and circumstances personally known to said Agent, respecting the violations of the Act of October 28, 1919, known as the "National Prohibition Act" and referred to in the affidavit hereto attached, and

WHEREAS, the said Agent thereafter and heretofore, to wit, on the said last-mentioned date made and filed with me as such Commissioner his affidavit, which said affidavit is hereto attached marked Exhibit "A" and by reference made a part hereof

to all intents and purposes the same as if herein in this warrant set out in full; and

WHEREAS, the said examination and affidavit was had and made for the purpose of having issued thereunder and thereon a search-warrant to search the premises described in said affidavit for the property mentioned and described therein; and

WHEREAS, from the said examination and facts set out in said affidavit, I, ALBERT M. HARDIE, as such Commissioner, being thereupon and therefrom satisfied of the existence of the grounds of the application and that there is probable cause to believe that the grounds of and upon which the application is based, do exist, I find that there is probable cause for the issuance of this warrant; that the particular grounds and probable cause for the issuance of this search-warrant are the facts and circumstances set out in [53] the affidavit of C. A. HOWARD hereto attached and made a part hereof as hereinabove set out.

NOW, THEREFORE, pursuant to Section 25 of Title II of the said National Prohibition Act, you are hereby authorized and empowered to enter the premises and place mentioned, referred to and described in said affidavit, and every part thereof, in the day or night time and to thoroughly search the same for the following described property, to wit: intoxicating liquors, to wit, alcohol (jackass brandy, corn whiskey, wine of pepsin, neuropin, pepsin rennin, fermented grape juice), brandy, wine, whiskey, rum, gin, beer, ale, porter, sherry wine, port wine, and spirituous, vinous, malt and

fermented liquors, liquids and compounds by whatever name called containing one-half of one per centum or more of alcohol and fit for use for beverage purposes, stills, worms, coils, mashes, goosenecks, hydrometers, essences, caramel, coloring materials, boiler, and if found to seize the same and take it into your possession to the end that the said property may be thereafter dealt with according to law, and hereof to make due return with written inventory of the property taken by you or any or either of you, within ten days as required by law.

WITNESS my hand and official seal this 1st day of October, 1924.

ALBERT M. HARDIE,
United States Commissioner in and for the Northern District of California.

[Endorsed]: Receipt of a copy of the within petition admitted this 16th day of April, 1926, and it is stipulated that same may be heard on April 19, 1926.

EDGAR R. BONSALL,
U. S. Atty.

Filed Apr. 17, 1926. [54]

[Title of Court and Cause.]

PETITION FOR RETURN OF PROPERTY AND TO SUPPRESS EVIDENCE (MOTION "D").

To the Honorable JOHN S. PARTRIDGE, Judge of the District Court of the United States in and for the Northern District of California:

The petition of Joseph E. Marron respectfully shows:

I.

That at all of the times herein mentioned Samuel Rutter was duly qualified and acting Prohibition Director of the State of California.

II.

That on or about the 2d day of October, 1924, a Federal Prohibition Agent, acting under and pursuant to the authority of said Samuel Rutter, made and executed an affidavit, a copy of which said affidavit is attached to the petition filed herein designated as petition "A," the Court's attention being respectfully directed to said petition for the full contents of said affidavit, which said affidavit prayed that a search-warrant be issued to search the premises commonly known and designated as No. 1249 Polk Street, in the City and County of San Francisco, State of California.

III.

That on or about the 2d day of October, 1924, Albert [55] Hardie, a United States Commissioner in and for the Northern District of California, is-

sued a purported search-warrant to search said premises described as aforesaid, a copy of which said warrant is attached to petition "A" referred to in the foregoing paragraph, the attention of the Court being respectfully directed to said petition "A" for the full contents of said search-warrant.

IV.

That on or about the said 2d day of October, 1924, pursuant to the authority conferred upon them in said search-warrant the said Samuel Rutter through F. W. Whittier and other Federal Prohibition Agents whose names are unknown to your petitioner, entered the said premises known as No. 1249 Polk Street, in the said City and County of San Francisco, State of California, and seized and carried away therefrom certain personal property, to wit: certain papers, records, books of account and ledgers, which were and are the private and personal property of your petitioner.

V.

That your petitioner, Joseph E. Marron, was, on said 2d day of October, 1924, and at all of the times herein mentioned, the lessee and occupant of the premises known as 1249 Polk Street, San Francisco, California.

VI.

That said search and said seizure, as aforesaid, was and is in direct violation of your petitioner's constitutional rights under the Fourth and Fifth Amendments to the Constitution of the United States of America, for the following reasons, to wit:

2. The seizure of the said papers, records, books [56] of account and ledgers, was done in contravention of the rights of your petitioner under the Fourth Amendment to the Constitution of the United States of America, for the reason that said papers, records, books of account and ledger were not particularly described in the search-warrant as things to be seized, as required by the said amendment.

b. The said papers, records, books of account and ledger were not instruments or fruits of crime, but, on the contrary, were and are the private memoranda, the private property and the private papers, documents and writings of your petitioner.

c. The said purported search-warrant only authorizes the said Federal Prohibition Agents, as aforesaid, to search the said premises as aforesaid, for the following described personal property, to wit:

> Intoxicating liquor, to wit, alcohol, brandy, wine, whiskey, rum, gin, beer, ale, porter, sherry wine, port wine, jackass brandy, corn whiskey, wine of pepsin, neuropin, pepsin rennin, fermented grape juice and spirituous, vinous, malt and fermented liquors, liquids and compounds by whatever name called containing one-half of one per centem or more of alcohol and fit for use for beverage purposes, stills, worms, coils, mashes, goosenecks, hydrometers, essences, caramel, colroing materials, boilers.

d. The said Federal Prohibition Agents, above referred to, were at the time of executing the warrant, as aforesaid, unlawfully upon the premises and were at said time and said place trespassers in taking the said papers, records, books of account and ledger. [57]

e. The said papers, records books of account and ledger were not upon the person of your petitioner, but, on the contrary, were located in the said premises hereinabove referred to.

f. There was neither identification of the said papers, records, books of account and ledger, nor probable cause alleged in the affidavit hereinbefore referred to as having been set out in petition*er* "A" filed herein, for the seizure of the papers, records, book*ds* of account and ledger, and that their taking was illegal and void.

g. That at the time the said Prohibition Agents served said warrant and seized said papers, records, books of account and ledger they failed and neglected to conform to the requirements of said search-warrant, in this:

1. That they failed to make due return with written inventory of the property so taken (i. e., papers, records, books of account and ledger) within ten days as required by law, or at all.

2. That they failed and neglected to comply with the requirements of said search-warrant as set forth in Section 25, Title 2 of said National Prohibition Act and Section 12, Title II, of the Espionage Act (Comp. St. 1918; Comp. St. Ann. Supp. 1919, Sec. 10596¼L), by failing to give a

receipt for the property taken (i. e., papers, records, books of account and ledger) specifying it in detail to the person from *who* it was taken or in whose possession it was found; or, in the absence of any person at the time of the service of said warrant, in leaving said receipt for said property where the property was found. [58]

h. That the failure of said agents, or either of them to comply with the said requirement of said search-warrant as hereinabove set out rendered all proceedings thereunder, and particularly that portion with respect to the seizure of said papers, hereinabove enumerated, void, and all evidence obtained thereby inadmissible.

i. That attached hereto and marked Exhibit "A" is an exact copy of the return made by said Prohibition Agent Whittier on said warrant hereinabove referred to.

VII.

That your petitioner is informed and believes and therefore alleges that the United States Government proposes to and will, unless restrained by this Honorable Court, use said personal property seized as aforesaid as evidence against your petitioner in the trial of the above-entitled action.

WHEREFORE, your petitioner prays that an order be made forthwith directing the return of said personal property hereinabove described and set forth, and that all matters pertaining thereto, and all things or matters discovered as a result of the

entries of private matters contained therein, be excluded as evidence.

JOSEPH E. MARRON,
Petitioner.

CHAS. J. WISEMAN and
HUGH L. SMITH,
Attorneys for Petitioner. [59]

State of California,
City and County of San Francisco,—ss.

Joseph E. Marron, being first duly sworn, deposes and says: That he is the petitioner in the above and foregoing petition*er* for return of property and to suppress evidence; that he has read said petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to those matters he be*lives* it to be true.

[Seal] JOSEPH E. MARRON.

Subscribed and sworn to before me this 16th day of April, 1926.

JOHN WISNOM,
Notary Public in and for the City and County of San Francisco, State of California. [60]

EXHIBIT "A."

RETURN ON SEARCH-WARRANT.

Returned, this 2 day of October, 1924. Served by making search as within directed, upon which search I found:

16 pint bottles champagne.
9—1/5 gal. bottles white wine.

5—1/5 gal. bottle whiskey.
2—quart bottle whiskey.
1—1/5 gal. bottle full gin.
2 bottles Bacardi rum.
1—1/5 gal. bottle brandy.
2—1/5 gal. bottle Scotch whiskey.
1—1/5 gal. bottle 1/2 full Scotch whiskey.
1 bottle vermouth.
1 bottle picon 1/3 full.
1—1 gal. bottle 3/4 full gin.
8 bottles sweet wine.
1 bottle 1/3 full whiskey.
1—1 gal. bottle 1/6 full sweet wine.
2 sacks Canadian beer.
174 bottles home brew beer.

And duly inventoried the same as above, according to law.

W. F. WHITTIER.

I, W. H. Whittier, the officer by whom this warrant was executed, do swear that the above inventory contains a true and detailed account of the property taken by me on the warrant.

W. F. WHITTIER.

Subscribed and sworn to before me this —— day of ——, 1924.

_____,
United States Commissioner, Northern District of California. [61]

[Endorsed]: Receipt of a copy of the within petition is hereby admitted this 16th day of April,

1926, and it is stipulated that the same may be heard on April 19, 1926.

EDGAR R. BONSALL,
Asst. U. S. Atty.,
Attorney for Plaintiff.

Filed Apr. 17, 1926. [62]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 19th day of April, in the year of our Lord one thousand nine hundred and twenty-six. Present: The Honorable A. F. ST. SURE, Judge.

[Title of Cause.]

MINUTES OF COURT—APRIL 19, 1926—ORDER DENYING PETITION TO EXCLUDE EVIDENCE MARKED "A."

After hearing Hugh L. Smith, Esq., attorney for defendant, ordered that the petition to exclude evidence, heretofore filed and submitted to the Court be withdrawn. Mr. Smith then presented to the Court four petitions to exclude evidence upon behalf of defendant Joseph E. Marron, said petitions being lettered "A," "B," "C" and "D." After hearing Mr. Smith and E. R. Bonsall, Esq., Asst. U. S. Atty., ordered that petition to exclude evidence marked "A" be denied and that petitions to ex-

clude "B," "C" and "D" be submitted to the Court for decision. [63]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 20th day of April, in the year of our Lord one thousand nine hundred and twenty-six. Present: The Honorable A. F. ST. SURE, District Judge.

[Title of Cause.]

MINUTES OF COURT—APRIL 20, 1926—ORDER DENYING PETITIONS FOR RETURN OF PROPERTY AND TO EXCLUDE EVIDENCE, LETTERED "B," "C" AND "D."

Ordered that petitions for return of property and to exclude evidence, lettered "B," "C" and "D," be denied. [64]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Wednesday, the 21st day of April, in the year of our Lord one thousand nine hundred and twenty-six. Present: The Honorable A. F. ST. SURE, District Judge.

[Title of Cause.]

MINUTES OF COURT—APRIL 21, 1926—TRIAL.

This case came on regularly this day for trial of defendant, Joseph E. Marron, who was present with his Attorneys, Hugh L. Smith, Chas. J. Wiseman and Joseph L. Taffee, Esqs. E. R. Bonsall, Esq., Asst. U. S. Atty., was present for United States. Upon calling of case, all parties answering ready for trial, Court ordered same proceed and that the jury-box be filled from regular panel of trial jurors of this court. Accordingly, the hereinafter-named persons, having been duly drawn by lot, sworn, examined and accepted, were duly sworn as jurors to try the issues herein, viz.:

1. C. B. Abbott.
2. Alfred Kutner.
3. Miles W. Kirk.
4. B. A. Benjamin.
5. M. C. Lewis.
6. Ralph Davis.
7. E. P. Anderson.
8. H. A. Deckelman.
9. Stanley C. Harris.
10. J. S. Crew.
11. R. G. Fontana.
12. H. V. Carter.

Mr. Bonsall called W. F. Whittier, who was duly sworn and examined as a witness on behalf of the United States.

After admonishing jury, Court ordered further trial continued until Apr. 22, 1926, at 10:30 A. M. [65]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Thursday, the 22d day of April, in the year of our Lord one thousand nine hundred and twenty-six. Present: The Honorable A. F. ST. SURE, District Judge.

[Title of Cause.]

MINUTES OF COURT—APRIL 22, 1926—TRIAL (RESUMED).

This case came on regularly for further trial. The respective parties and the jury were present as heretofore. W. F. Whittier resumed stand and was further examined. G. L. Lee, Fred Carmona, Geo. E. Eldridge, E. O. Vaughn, D. E. Mocker, E. T. O'Donnell, L. V. Bybee and Walter Brand were each duly sworn and examined as witnesses for United States. United States introduced following exhibits which were filed and marked U. S. Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9 and 15. For purpose of identification, Government introduced Exhibits Nos. 10, 11, 12, 13, 14. Defendant introduced and filed Exhibit marked "A." After admonishing jury, Court ordered further trial continued to April 23, 1926, at 10:30 A. M. [66]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 23d day of April, in the year of our Lord one thousand nine hundred and twenty-six. Present: The Honorable A. F. ST. SURE, District Judge.

[Title of Cause.]

MINUTES OF COURT—APRIL 23, 1926—TRIAL (RESUMED).

The parties hereto with their attorneys and the jury impaneled herein being present as heretofore, the trial hereof was resumed. Walter Brand was recalled and L. H. Coleman, Clarence W. Bell, Sidney Franklin, Walter W. Menne, Charles J. Haggerty, George W. Marsh, W. E. Vivens, Rudolph Herring, W. K. Latham, Joseph S. Camplong, Charles D. O'Connor, John J. Casey, Jens Johan Neilsen were sworn and testified on behalf of United States. Mr. Bonsall introduced in evidence and filed U. S. Exhibits Nos. 16, 17, 18, 19, 20, 21, 22, 23, 24, 25. On cross-examination of Jens Johan Neilsen, the defendant introduced the Indictment in case of U. S. vs. Jens Neilsen and Kurt Hauschildt, No. 17,689. Ordered further trial continued to Apr. 27, 1926, at 10:30 A. M. The jury, after being admonished by the Court, was excused until that time. [67]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 27th day of April, in the year of our Lord one thousand nine hundred and twenty-six. Present: The Honorable A. F. ST. SURE, District Judge.

[Title of Cause.]

MINUTES OF COURT—APRIL 27, 1926—TRIAL (RESUMED).

The parties hereto with their attorneys and the jury impaneled herein being present as heretofore, the trial was resumed. F. D. Stribling, George Neary, I. D. Dwyer, Charles A. Sankey, Jr., Leonard H. Breidenstein and E. O. Heinrich, were sworn and testified on behalf of the United States, and the United States introduced in evidence and filed its exhibits marked 10, 11, 12, 13, 14, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35. By consent of the attorneys, it is ordered that U. S. Exhibits 26 and 27 be returned to E. D. Dwyer, Deputy Registrar of voters, which said exhibits were returned to E. D. Dwyer in open court. The U. S. rested. Mr. Smith moved the Court to instruct the jury to return a verdict of not guilty, which said motion was ordered denied. The defendant offered no evidence, and the evidence was thereupon closed. Counsel thereupon made their arguments to the Court and jury and, pending the further arguments, it was ordered that

the further trial hereof be continued until 10:30 A. M. to-morrow. The jury, after being admonished by the Court, was excused until that time. [68]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Wednesday, the 28th day of April, in the year of our Lord one thousand nine hundred and twenty-six. Present: The Honorable A. F. ST. SURE, District Judge.

[Title of Cause.]

MINUTES OF COURT—APRIL 28, 1926—TRIAL (RESUMED).

The parties hereto with their attorneys and the jury heretofore impaneled herein, being present as heretofore, the trial was resumed. After the further arguments by the attorneys and the instructions of the Court to the jury, the jury, at 2:26 o'clock P. M., retired to deliberate upon their verdict. At 2:45 o'clock P. M., the jury returned into court and upon being asked if they had agreed upon a verdict, replied in the affirmative and returned the following verdict, which was ordered recorded, viz.: "We, the jury, find Joseph E. Marron, the defendant at the bar, Guilty. H. V. Carter, Foreman," and the jurors upon being asked if said verdict as recorded is their verdict, each juror replied that it is. Ordered that the jury be

discharged from further consideration hereof. Defendant made a motion in arrest of judgment on all statutory grounds, which said motion was ordered denied. Defendant moved for a new trial on all the statutory grounds, which said motion was ordered denied. Defendant was allowed an exception to each ruling of the Court. The defendant was called for judgment. Ordered that defendant Joseph E. Marron be imprisoned for a period of 2 years in U. S. Penitentiary at Leavenworth, Kansas, and that he pay a fine of $10,000.00 or, in default thereof, defendant be further imprisoned [69] until fine is paid or he be otherwise discharged by due process of law, as detailed in Judgment Book. [70]

[Title of Court and Cause.]

VERDICT.

We, the jury, find JOSEPH E. MARRON, the defendant at the bar, GUILTY.

H. V. CARTER,
Foreman.

[Endorsed]: Filed April 28, 1926, at 2 o'clock and 45 minutes P. M. [71]

[Title of Court and Cause.]

MOTION FOR NEW TRIAL FOR DEFENDANT JOSEPH E. MARRON.

Now comes the defendant Joseph E. Marron and

moves the Court that the verdict herein rendered be vacated and a new trial heard for the following reasons:

1. That the verdict is contrary to the evidence.
2. That the verdict is contrary to the weight of the evidence.
3. That the verdict is contrary to the law as given to the jury by the Court.
4. That the Court erred in refusing defendant Joseph E. Marron special instructions, Nos. 1, 7, 15, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, 31, 32, 34, 35.
5. That the Court erred in so much of its general charge as is left to the jury to determine whether or not the defendant, here, was the party to the, or any, conspiracy as charged in the indictment.
6. That the Court erred in admitting evidence contrary to law.
7. That new and material facts have come to light since the trial. [72]
8. That other errors at law appeared upon the trial, prejudicial to defendant. (85)
9. That errors at law occurred during the trial of the case in admitting evidence prior to June, 1923, and subsequent to October 3, 1924, which were duly excepted to by the defendant.
10. Errors of law occurring at the trial and excepted to by the defendant.

11. Further, on the ground of newly discovered evidence.

HUGH L. SMITH and
CHAS. J. WISEMAN,
Attorneys for Defendant Joseph E. Marron.

[Endorsed]: Receipt of a copy of the within motion is hereby admitted this 4th day of May, 1926.

GEO. J. HATFIELD,
Attorney for Plaintiff.

Filed May 4, 1926. [73]

[Title of Court and Cause.]

MOTION IN ARREST OF JUDGMENT (JOSEPH E. MARRON).

Now comes the defendant, Joseph E. Marron, in the above-entitled action and against whom a verdict of guilty was rendered on the 28th day of April, 1926, on the indictment filed herein, and moves the Court to arrest the judgment against said defendant on said indictment and hold for naught the verdict of guilty rendered against him for the following reasons:

1. That said indictment does not charge any offense against the laws of the United States nor does it charge said defendant with the doing of anything, the doing of which is forbidden by the laws of the United States.

2. That said indictment does not set forth any facts sufficient in law to constitute a conviction.

3. That there is no fact or circumstance stated therein to advise the Court that an offense has been committed against the United States.

4. That evidence against this defendant has been received and considered there on matters pertaining to former jeopardy after said jeopardy had already attached as to each of them. [74]

5. That said indictment fails to set forth every element of the offense intended to be charged.

6. That it does not set forth any facts sufficient (89) in law to support a conviction.

7. That this defendant has been convicted without due process of law, and in violation of Articles IV, V, and VI of Amendments of the Constitution of the United States.

WHEREFORE, this defendant prays that this motion be sustained and judgment of conviction against him be arrested and held for naught, and that he have all such other orders as may be just and proper in the premises.

HUGH L. SMITH.
HUGH L. SMITH and
CHAS. J. WISEMAN.
CHAS. WISEMAN,
Attorneys for Defendant Joseph E. Marron.

[Endorsed]: Receipt of a copy of the within motion in arrest of judgment is hereby admitted this 4th day of May, 1926.

GEO. J. HATFIELD,
Attorneys for Plaintiff.

Filed May 4, 1926. [75]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 15708.

THE UNITED STATES OF AMERICA

vs.

JOSEPH E. MARRON, *alias* EDDIE MARRON.

JUDGMENT ON VERDICT OF GUILTY.

Conv. of Conspiracy to Violate the National Prohibition Act (Violation Sec. 37, C. C. U. S., and Act of Oct. 28, 1919).

Edgar R. Bonsall, Esq., Assistant United States Attorney, and the defendant with his counsel came into court. The defendant was duly informed by the Court of the nature of the Indictment filed on the 17th day of October, 1924, charging him with the crime of conspiracy to violate the National Prohibition Act. (Violation Sec. 37, C. C. U. S. and Act of Oct. 28, 1919); of his arraignment and plea of Not Guilty; of his trial and the verdict of the jury on the 28th day of April, 1926, to wit:

"We, the Jury find Joseph E. Marron the defendant at the bar, Guilty.

"H. V. CARTER, Foreman."

The defendant was then asked if he had any legal cause to show why judgment should not be entered herein and no sufficient cause being shown or appearing to the Court, and the Court having denied a motion for new trial and a motion in arrest of

judgment; thereupon the Court rendered its Judgment;

THAT, WHEREAS, the said Joseph E. Marron having been duly convicted in this court of the crime of cons. to violate National Prohibition Act (viol. Sec. 37 U. S. C. C. and Act of Oct. 28th, 1919).

IT IS THEREFORE ORDERED AND ADJUDGED that the said Joseph E. Marron be imprisoned for the period of two (2) years in [76] the United States Penitentiary at Leavenworth, Kansas, and pay a fine in the sum of Ten Thousand ($10,000.00) Dollars; further ordered that in default of the payment of said fine that said defendant be further imprisoned until said fine be paid or until he be otherwise discharged in due course of law.

Judgment entered this 28th day of April, A. D. 1926.

WALTER B. MALING,
Clerk.
By C. W. Calbreath,
Deputy Clerk.

Entered in Vol. 20 Judg. and Decrees, at page 257. [77]

[Title of Court and Cause.]

ENGROSSED BILL OF EXCEPTIONS OF JOSEPH E. MARRON.

BE IT REMEMBERED: That on the 21st day of April, 1926, at a stated term of the District Court

(Testimony of W. F. Whittier.)

of the United States, for the Northern District of California, First Division, the above-entitled cause came on regularly for trial before Hon. A. F. St. Sure presiding; George Hatfield, Esq., District Attorney for the Northern District of California, and Edgar Bonsall, Esq., Assistant to the United States District Attorney for the Northern District of California, appearing for the plaintiff; Hugh L. Smith, Esq., and Chas. J. Wiseman, Esq., and John J. Taafe, Esq. appearing for the defendant, Joseph E. Marron.

THEREUPON a jury was empaneled and sworn according to law; opening statements having been made to the jury by counsel for the prosecution, and evidence hereinafter following introduced, the following proceedings occurred:

TESTIMONY OF W. F. WHITTIER FOR THE GOVERNMENT.

W. F. WHITTIER, a witness called for the United States, and sworn, testified as follows:

Direct Examination.

(By Mr. BONSALL.)

I testified in this case once before. My position [78] with the Government at that time was Federal prohibition agent. I had been such agent for a year or a year and a half, or something like that. I believe I was present at a raid at 1249 Polk Street, on or about October 2, 1924. I think Agents Lee, Howard and Eldridge were with me at that time. We had a search-warrant for the place. We found

(Testimony of W. F. Whittier.)

liquor at that time. I could not tell you what we found. I don't remember what we found. We found assorted liquors—everything, I think. I think there was some beer there.

(The attention of the witness was here directed to page 17 of the transcript of the previous trial for the purpose of refreshing his memory concerning the subject matter of his present testimony.)

The WITNESS.—(Continuing.) Yes, there is whiskey mentioned here. I remember the champagne, too. There was champagne there. We found champagne there. That was in a trap in the closet in one of the front rooms. I don't remember whether there were a dozen or half a dozen bottles of champagne. If I testified in the former trial that there was 16 pint bottle there, I guess that is so.

I am not now in the employ of the Government. I won't state as to whether there was white wine there. I think there was both port wine and sherry wine, if I remember right. There was such an assortment. There were two or three boxes of it. There was a lot of home brew, too. I remember the home brew because one of them exploded. I believe there was whiskey there. There was a considerable number of bottles. I think there was gin, and Bicarde rum. I don't remember any brandy. I don't remember in my former testimony that I said that there was one-fifth gallon bottle of brandy. There was Scotch whiskey. I do not remember any vermuth. There was a bottle of Pecan. There was

(Testimony of W. F. Whittier.)

port and sherry and home brew. There was some Canadian beer—two sacks of Canadian beer and 174 bottles of home brew. That was in boxes. That is what exploded. [79]

EXCEPTION No. 1.

Mr. SMITH.—Now, may it please the Court, so that our record may be protected in this matter, I am going to ask that all of that testimony be stricken out on the ground that that is not the proper way to refresh the memory of this particular witness; and also upon the ground that it is immaterial, irrelevant and incompetent, for the reason that at the time the officer was on the premises he was acting under a warrant; and in addition to seizing the articles suggested by the Court, he also seized some books, papers and memoranda not described in the warrant, and that in so doing he exceeded his authority, and, therefore, became a trespasser *ab initio,* and that all of his acts at that time upon those premises are inadmissible as evidence in this particular case.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

The WITNESS.—(Continuing.) To Mr. Bonsall.

I made a thorough search of the place at that time. I went through all the rooms. They had tables in them. There was a couch or davenport. I don't know just what you would call it; in one of the front rooms; chairs; I don't remember whether there was a room that one of the men claimed was

(Testimony of W. F. Whittier.)

his room, or not. I won't say for sure whether there was a bed in there, or not. I am telling you how it was furnished.

To the COURT.—I am giving you my best memory of the matter. I burned my records when I left the Government service. I wanted to forget all of it.

To Mr. BONSALL: There was a bedroom there that I think one of the men there claimed was his. Now, I won't say for sure, I don't remember if there was a bed,—one of these beds in there, or not. I think he stated that that was his room. That was off to the rear of the kitchen, or the serving-room. There was a serving-room [80] I would call it a serving-room. That was in the rear of the kitchen. There was not any bar that you stand up to, if that is what you mean. There was nothing of that kind. I would not state whether there was one there or not.

To Mr. BONSALL: I think it was Birdsall who was in charge of the premises on October 2, 1924. He was one of the co-conspirators named in this case prior to this trial. There were a lot of people in there at that time. I should say there were a dozen people in there. Some of them were sitting in one room and some in another. The principal thing they were doing when I got there was that they were trying to get out.

Mr. BONSALL.—Didn't you testify at the last trial regarding these people that you saw in the premises at the time you entered?

(Testimony of W. F. Whittier.)

The WITNESS.—(Continuing.) I am just telling you that when I was in there there were some women in one room, and there was a girl with a squirrel fur coat in another room with a chap, and they all wanted to get out. We had to hold them in there to question them as to what they were doing.

(The attention of the witness was directed to page 22 of the Transcript of the previous trial for the purpose of refreshing his recollection as to what happened at that time.)

The WITNESS.—(Continuing.) That is what I said, a dozen men and women. The Transcript of my previous testimony says that they were drinking. They were not drinking when I was in there. There was something on the table, but they were not drinking. According to that transcript I testified at the last trial that they were drinking. I cannot remember that that is a correct statement. It was a year and one-half or two years ago that happened. I don't remember it. I saw a bottle on the table; if I remember right, it was whiskey. I took the bottle and brought it in as evidence. The Transcript of the testimony I gave at the former trial, page 22, says it was whiskey. The bottle was there and the glasses were there and these people were sitting there, that is, they were sitting there until I came in. I found a book on those premises at [81] *at* 1249 Polk Street, in the City and County

(Testimony of W. F. Whittier.)

of San Francisco, on the 2d day of October, 1924, besides the liquor.

(Question by Mr. BONSALL.)

EXCEPTION No. 2.

Q. I show you this book and ask you if you have ever seen that book before.

Mr. SMITH.—Just a second before we get any testimony with respect to that book.

Mr. SMITH.—Yes, I know what it is, I am thoroughly familiar with the book and its contents. We object to any testimony concerning this book upon the following grounds: First of all, I think I had better develop from the witness, if the Government will permit me, as to the manner in which that book came into the possession of this man.

Mr. BONSALL.—You will have your turn to examine him later.

Mr. SMITH.—All right. I will make my objection. We object to the introduction of the book, or any testimony with respect to it, upon the following grounds:

That the book was taken from the premises 1249 Polk Street on the 2d day of October, at which time certain prohibition agents were there under and by virtue of a search-warrant. The search-warrant did not authorize the seizure of this book, or of any papers, or of any memorandum, but only authorized the officers in whose possession the warrant was to seize liquors and the various paraphernalia used in the making of liquor.

The search-warrant that I refer to was issued by Albert M. Hardie, United States Commissioner in and for the Northern District of California, on the 1st day of October, 1924. It was issued upon an affidavit that was sworn to before the Commissioner I have already named on the 1st day of October by C. A. Howard, who therein in said affidavit styled himself as a federal prohibition agent. [82] The warrant that I refer to did not in any manner describe this book or any of the papers seized at that time.

We object to the introduction of any evidence concerning this book, or the book, itself, upon the following ground:

That the seizure of the papers, records and books of account and ledger was done in contravention of the rights of the defendant Marron under the Fourth Amendment to the Constitution of the United States of America, for the reason that the said papers, records, and books of account and ledger were not particularly described in the search-warrant as things to be seized, as required by the said amendment.

Second: That the papers, records, and books of account and ledger were not instruments or fruits of crime, but, on the contrary, were and are the private memoranda, the private property and the private papers and documents and writings of the defendant Marron. That the purported search-warrant only authorized the prohibition agents to search the said premises for the following described personal property, to wit: Intoxicating liquor, to wit,

alcohol, brandy, wine, whiskey, rum, gin, beer, ale, porter, sherry wine, port wine, jackass brandy, corn whiskey, wine of pepsin, neoropin, pepsin rennin, fermented grape juice, and spirituous, vinous, malt and fermented liquors, liquids and compounds by whatever name called containing one-half of one per centum or more of alcohol and fit for use for beverage purposes; stills, worms, coils, mashes, goosenecks, hydrometers, essences, caromel, coloring materials, boilers.

That the said federal prohibition agents were at the time of the execution of the warrant aforesaid unlawfully upon the premises, and were at said time and said place trespassers in taking said papers, records, books of account and ledger.

That the papers, records, books of account and ledger were not upon the person of the defendant Marron, but, on the contrary, [83] were located in the said premises hereinabove referred to.

That there was neither identification of the said papers, records, books of account and ledger, nor probable cause alleged in the affidavit that I have heretofore referred to as having been issued by Commissioner Hardie and supported by the affidavit of then Prohibition Agent Howard, for the seizure of the papers, records, books of account, and ledger, and that their taking was illegal and void.

Upon the further ground that the records, papers, and books of account, which are the private and personal writings of the defendant Marron, are immune from seizure, and that the rights of the defendant

(Testimony of W. F. Whittier.)

Marron are also violated under the Fifth Amendment to the Constitution of the United States of America.

The COURT.—Q. Were any arrests made at that time? A. Yes, sir.

Q. Who was arrested? A. Birdsall.

The COURT.—The objection is overruled.

Mr. SMITH.—We note an exception.

The WITNESS.—(Continuing.) I saw that book, I think, in the closet in the front room. There was champagne in there besides the book. There was some money in there in the same closet where this book was found. I don't remember whether the money was on the top of this book or underneath the book. There was a lot of greenbacks. I am not sure whether the money was loose in the closet or whether it was in a container. I don't know whether it was. I think it was in a cigar-box. There was considerable currency in the cigar-box, but it went out of the cigar-box. While we were seaching there it was taken out.

EXCEPTION No. 3.

Q. I didn't ask you anything about that; I only asked you if there was considerable money in that cigar-box at the time you saw it [84] there?

Mr. SMITH.—We object to that as immaterial, irrelevant and incompetent, and it would not tend to prove anything anyway, even if there was considerable money there.

The COURT.—Objection overruled.

(Testimony of W. F. Whittier.)

Mr. SMITH.—Exception.

The WITNESS.—(Continuing.) I don't know how much or whether it was 20's, or 10's, or 5's; I saw it and went to tell Birdsall to come and get it, and in the meantime it disappeared. I think I asked Birdsall something about the book and threw it over on the table in the rear room. No, I didn't ask him about the book. I asked him about his name. He gave me the name of Howard at first. I told him it was not Howard; it was Birdsall.

EXCEPTION No. 4.

Q. I call your attention to page 23 of your testimony at the last trial, and I will ask you if that helps you in your recollection as to whether Birdsall said anything about that book, or not?

Mr. WISEMAN.—If the Court please, we object to that upon the ground it is immaterial, irrelevant and incompetent; and on the further ground that any statement made by Birdsall would be hearsay so far as Marron is concerned until a conspiracy is established.

A. I think that the statement was made and that Howard—

Mr. SMITH.—Just a moment. May that answer go out until the Court rules on our objection?

The COURT.—Yes, it may go out. I presume the District Attorney intends to connect up this testimony by proof tending to show a conspiracy.

Mr. BONSALL.—Yes, your Honor, I do.

The COURT.—Objection overruled.

(Testimony of W. F. Whittier.)

Mr. SMITH.—Exception. And upon the further ground that if a conspiracy existed at all it is presumed to have come to an end [85] at the time of the arrest. Birdsall was then arrested. If he made any statement after he was arrested that evidence would be only binding on himself, and it would be hearsay as to the defendant Marron.

The COURT.—I think your statement may be correct, but we have just started the trial. I don't know that there has been any proof of conspiracy yet.

Mr. BONSALL.—No, your Honor, I can't prove everything at once.

Mr. WISEMAN.—But they admit that Birdsall was arrested at that time. That is clear.

The COURT.—Yes, Birdsall, was arrested at the time the book was taken. That stands very clearly in the record. I will overrule the objection.

Mr. WISEMAN.—Exception.

The WITNESS.—(Continuing.) I believe Birdsall at that time said something about leaving the book on those premises at 1249 Polk Street, San Francisco.

EXCEPTION No. 5.

W. E. WHITTIER, direct examination (resumed.)

Mr. BONSALL.—Before proceeding any further with the evidence of this witness, I will make a formal offer in evidence of this little gray ledger.

Mr. SMITH.—To which we object, if the Court

(Testimony of W. F. Whittier.)

please, on all the grounds set forth in our petition, and on all the grounds urged yesterday.

The COURT.—Objection overruled.

Mr. SMITH.—Exception. May all of the objections that were interposed in the various motions filed with your Honor be considered as having been made at this time to the introduction of this book?

[86]

The COURT.—Yes.

(Thereupon the book was here introduced in evidence, as United States Exhibit No. 1.)

Said exhibit was in the following words and figures, to wit:

(Here insert exhibit.)

The WITNESS.—(Continuing.) I had some conversation with the defendant Birdsall, at the time of this raid on October 2d, 1924.

Q. Did any of that conversation refer to who was the owner of that place?

Mr. SMITH.—We object to any conversation with the defendant Birdsall on the ground that the conspiracy, in so far as the present condition of the record shows, terminated upon the arrest of the defendant Birdsall and any statements made by him after his arrest would be binding only on himself, if the Court please, upon the theory that the conspiracy, if one existed, had come to a termination.

The COURT.—Your idea is that this offense was a continuing one, is it?

Mr. BONSALL.—Yes, your Honor, following the theory in the Nan Patterson case. In these large

(Testimony of W. F. Whittier.)

conspiracies, some acts may take place after the arrest.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

A. Yes, I had a conversation with him.

Mr. BONSALL.—Q. Did he say who was the owner? A. Yes.

Q. Who did he say was the owner of the place?

A. Himself.

Mr. SMITH.—Without the necessity of repeating objections, may our entire objection *to run* to all of this testimony?

The COURT.—I presume it would be just as well to have that understanding, because it will save time. [87]

Mr. BONSALL.—Q. Do you recall if Mr. Birdsall mentioned Mr. Marron's name at that time?

Mr. SMITH.—That is objected to on the further ground that it is leading, as well as upon all of the other grounds heretofore urged.

A. No.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

Mr. BONSALL.—Q. I show you these five papers that are fastened together, and, without commenting on them, I ask you did you ever see them before?

A. I remember four of them, I guess they are the same ones. I remember four of them.

Q. Which four do you remember?

A. The water bill, and—

(Testimony of W. F. Whittier.)

Mr. SMITH.—Just a second, I would like to interpose the objection at this time to any interrogation regarding these papers upon all of the grounds I have heretofore urged with respect to the introduction of Exhibit 1 of the Government—I assume that that is the number that has been given to the book, is it?

Mr. BONSALL.—Yes, Exhibit 1.

Mr. SMITH.—And upon the further ground that there has been no *prima facie* case of conspiracy established at this time, and that, therefore, any interrogation concerning these papers would be improper.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

Mr. BONSALL.—Q. I show you this document and without comment I ask you whether you have seen that before.

A. I remember a gas and electric bill. There was a gas and electric bill, and there was a Spring Valley Water bill, and there was a bill from some rattan place, the Coulter rattan place [88] and, if I am not mistaken, a telephone bill.

Q. Is not this the bill that you identified heretofore on the previous trial of this case?

A. I suppose it is, but I don't know where this bill has been.

Mr. SMITH.—I ask that that answer go out as not being responsive.

The COURT.—Motion denied.

Mr. SMITH.—Exception.

(Testimony of W. F. Whittier.)

Mr. BONSALL.—Q. Did you find a telephone bill at No. 1249 Polk Street, made out to Eddie Marron, for $11.84? A. Did I find it?

Q. Was it found there?

Mr. SMITH.—Now, just a second. We object to that question, if the Court please, as immaterial, irrelevant and incompetent, and not binding on the defendant Marron, and as clearly hearsay as to him.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

Mr. BONSALL.—Q. Will you answer the question, Mr. Whittier?

A. One of the agents found a bill; I don't remember whether I did or who it was. One of us found it.

Mr. SMITH.—I ask that that go out as not responsive.

The COURT.—Motion denied.

Mr. SMITH.—Exception.

Mr. BONSALL.—Q. Did you see it found?

A. It was brought in afterwards and laid down in front of all of us.

Mr. SMITH.—I ask that that go out as not responsive. [89]

The COURT.—Motion denied.

Mr. SMITH.—Exception.

Q. You testified at the last trial, in January, 1925, with reference to these bills, did you not?

A. I don't remember.

Q. If you did so testify, the statements that you made at that time were true, were they not?

(Testimony of W. F. Whittier.)

A. As far as I remember.

Mr. SMITH.—Just a second. I ask that the answer go out for the purpose of making an objection. I object to that as immaterial, irrelevant and incompetent, and that it is not the proper way to refresh the memory of the witness.

The COURT.—Objection overruled. We are trying to save time here, Counsel.

Mr. SMITH.—I appreciate that, your Honor, but we cannot disregard the established rules of evidence in order to save time. We note an exception.

The COURT.—Well, I don't think we are. This witness, it appears, was heretofore in the employ of the Government. He testified sometime ago on the trial of this case. It seems that his memory is rather dim as to what he heretofore testified to. I think that his attention may be called to what he testified to at the former trial. Of course, it would be much better if the witness could take the record at the former trial and read it and refresh his memory. The impression that the Court gets, Mr. Whittier, is that you are somewhat hostile in this matter.

The WITNESS.—None, whatever.

The COURT.—It seems to me it would be better for all parties concerned if we could have your best recollection in this matter.

The WITNESS.—You don't want me to state something that I don't remember, do you?

The COURT.—I do not; no, I do not; but I do

(Testimony of W. F. Whittier.)

say that it is [90] very easy for you to read your former testimony.

The WITNESS.—I was up there last night and read it.

The COURT.—You did?

The WITNESS.—Yes.

Mr. BONSALL.—Q. I call your attention to page 181 of the transcript.

The COURT.—I have heard you testify in cases before, Mr. Whittier, and your testimony has always been clear-cut and to the point; very often I was led to say to officers of the court that I admired your manner of testifying. Your memory here shows indications of being somewhat at fault, it would appear to me now.

The WITNESS.—May I ask you a question? This is a year and a half ago, Judge, and I don't remember what happened unless I can refresh my memory.

The COURT.—Then I think you should refresh your memory from the record.

Mr. BONSALL.—It might be proper for me to swear the Clerk to prove that these papers constituted Exhibit 33 at the former trial.

The COURT.—They are papers on file in the records of this court. It seems to me absurd to take up the time of the Court and the jury with this sort of an examination of this witness with reference to these exhibits.

The WITNESS.—Yes.

(Testimony of W. F. Whittier.)

The WITNESS.—(Continuing.) These are the papers that were found at 1249 Polk Street. Here is the Spring Valley Water Company bill and here is the telephone bill. I am certain that these identical papers were introduced as evidence, as Plaintiff's Exhibit No. 33, at the last trial. I think they were found around the cash register, if I am not mistaken. The cash register was in the kitchen; what you would call the kitchen of the flat. One of them, I think, was alongside the cash register. I could not say offhand [91] which was alongside the cash register. My recollection is refreshed when you tell me that it was the check. I remember it was the check. I don't remember whether I had a conversation with Mr. Birdsall regarding any of these documents at the time of the raid. I will have to look at the transcript again. After I found these papers I accused Mr. Birdsall. I think I asked him, at least, if Mr. Marron did not own the place, and he stated no, that he owned it.

EXCEPTION No. 6.

Mr. BONSALL.—I now offer in evidence as Exhibit No. 2 a Pacific Gas & Electric bill made out to Eddie Marron, 1249 Polk Street from August 19th to September 19th, 1924, for $11.84.

Mr. SMITH.—To which, of course, we object on all the grounds heretofore urged, and upon the further ground that it is nothing but pure hearsay, and that no *prima facie* case of conspiracy has yet been established.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

(Thereupon the instrument was here introduced in evidence as United States Exhibit No. 2.)

Said exhibit was and is in the following words and figures to wit:

(Here insert exhibit.)

EXCEPTION No. 7.

Mr. BONSALL.—I now offer in evidence a bill of the Spring Valley Water Co. made out to Eddie Marron, 1249 Polk Street, service charge to September 24, 1924, giving the meter reading in the sum of $2.22.

Mr. SMITH.—May the same objection be considered as made to that?

The COURT.—It may. Objection overruled.

Mr. SMITH.—Exception.

(Thereupon the instrument was here introduced in evidence as United States Exhibit No. 3.)

Said Exhibit was and is in the following words and figures to wit:

(Here insert exhibit.) [92]

EXCEPTION No. 8.

Mr. BONSALL.—I now offer in evidence bill of Pacific Telephone & Telegraph Company, made out to Eddie Marron, 1249 Polk Street, with a stub attached for toll service, $8.19, and service charge $4.00, being to October 1, 1924, with a list of calls attached.

Mr. SMITH.—May the same objection be con-

sidered as having been made to the introduction of this particular exhibit?

The COURT.—Yes. Objection overruled.

Mr. SMITH.—Exception.

Mr. BONSALL.—I want to state that this list shows telephone calls to Sausalito, August 21; Sausalito, August 23d; Sausalito, August 25th. Several other calls on the same date. Sausalito on the 28th of August. Moss Beach on the 28th of August. Sausalito on the 1st of September. Sausalito on the 4th of September. Sausalito again on the 4th of September. Sausalito on the 5th of September. Sausalito on the 5th of September. Moss Beach on the 5th of September. Sausalito on the 6th of September. Sausalito on the 7th of September. Sausalito on the 8th of September, three calls. Sausalito on the 10th of September. Sausalito on the 10th of September. Moss Beach on the 13th of September. Sausalito on the 15th of September. Sausalito on the 15th of September. Sausalito on the 17th of September. Moss Beach on the 18th of September. Moss Beach on the 19th of September. There are some other calls in there, but those are the ones I want to particularly call the attention of the Court and jury to. I ask that this be marked in evidence with the statement of toll charges annexed.

Mr. SMITH.—And may the same objection be considered as having been made heretofore, and on the further ground that it is hearsay and not binding on the defendant Marron, and that it is immaterial, irrelevant and incompetent?

(Testimony of W. F. Whittier.)

The COURT.—Objection overruled.

Mr. SMITH.—Exception. [93]

(Thereupon the instrument was here introduced in evidence as United States Exhibit No. 4.)

Said exhibit was and is in the following words and figures, to wit:

(Here insert exhibit.)

EXCEPTION No. 9.

Mr. BONSALL.—I now offer in evidence a bill of the Coulter Rattan Works dated September 23, 1924, made out to Eddie Marron, for chairs and tables and rugs in the sum of $213.50. I ask that this be given the appropriate exhibit number.

Mr. SMITH.—The same objection is interposed to the introduction of this exhibit upon all the grounds heretofore urged to the others.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

(Thereupon this document was introduced in evidence as United States Exhibit No. 5.)

Said exhibit was and is in the following words and figures, to wit:

(Here insert exhibit.)

Mr. BONSALL.—Q. Mr. Whittier, I show you this document and ask you if you have ever seen it before? A. Yes, sir.

Q. Where did you find that?

A. I could not state in what part of the place.

Q. But it was found on the premises?

(Testimony of W. F. Whittier.)

A. Yes, sir.

Q. And also this Spring Valley Water Co. item, did you find that on the premises? A. Yes, sir.

Q. On the day in question?

A. Yes, as far as I remember; you know we were there twice.

Q. Yes, I know you were there twice, but to the best of your recollection it was on October 2d when you found these? A. Yes, sir. [94]

Q. And at the time you talked with Mr. Birdsall did you have these, if you recall?

A. One of us had them, yes.

Q. One of you had them there at that time?

A. Yes.

EXCEPTION No. 10.

Mr. BONSALL.—I now offer in evidence and request that it be given the appropriate number a telephone receipt made out to Eddie Marron for telephone No. Pro. 4953, 1249 Polk Street, in the sum of $16.12.

Mr. SMITH.—May the same objection be considered as having been made to this?

The COURT.—Yes. Objection overruled.

Mr. SMITH.—Exception.

(Thereupon this document was introduced in evidence as United States Exhibit No. 6.)

Said exhibit was and is in the following words and figures, to wit:

(Here insert exhibit.)

(Testimony of W. F. Whittier.)

EXCEPTION No. 11.

Mr. BONSALL.—I offer in evidence a receipt of the Spring Valley Water Co. for water at 1249 Polk Street for the term ending August 25, 1924, for $2.80.

Mr. SMITH.—The same objection.

The COURT.—Objection overruled.

(Thereupon this document was introduced in evidence as United States Exhibit No. 7.)

Said exhibit was and is in the following words and figures, to wit:

(Here insert exhibit.)

Mr. BONSALL.—Q. Did you take samples of any of the liquors you found at 1249 Polk Street at that time?

Mr. SMITH.—We object to the question as leading, and as immaterial, irrelevant and incompetent, and there has been no *prima* [95] *facie* case of conspiracy made out as yet. We object to it upon the ground that it is immaterial, irrelevant and incompetent, and upon all of the grounds heretofore urged in the various motions submitted to your Honor.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

A. Yes.

EXCEPTION No. 12.

Q. I show you these slips and ask you if you have ever seen them before? I will also show you the envelope they were in. A. Yes.

Q. Where did you find those slips?

(Testimony of W. F. Whittier.)

Q. When did you first see these papers?

A. I will have to look at that transcript again, I can't remember.

Q. I will show it to you in this printed copy of the transcript on appeal, Mr. Whittier, this was prepared by counsel at the time of the appeal.

Mr. BONSALL.—I think this will save time.

Q. Does this refresh your recollection as to the matter? A. Yes.

Q. Does that aid you in fixing the date when you first saw these slips?

A. Yes. I think those were in that book.

Q. On October 2, 1924? A. Yes, sir.

Q. At 1249 Polk Street? A. Yes, sir.

Q. In what book were they?

A. The gray ledger.

Q. You mean United States Exhibit No. 1 on this trial? A. Yes, sir.

Mr. BONSALL.—"Sept. 28, Bill Windler $10. Birdsall $20, September 8. Birdsall $50, September 18, Change $100; Marron $60; Slot machine $30. Col. Bevin $5, September 21, 1924." These five slips of paper with longhand writing on them are now offered in evidence as Government's Exhibit 8. [96]

(Thereupon the documents were introduced in evidence as United States Exhibit No. 8.)

Said exhibit was and is in the following words and figures, to wit:

(Here insert exhibit.)

(Testimony of W. F. Whittier.)

Mr. SMITH.—We object on all the grounds heretofore urged, and on the ground that they are immaterial, irrelevant and incompetent, and not in the handwriting of the defendant, and, therefore, they are not binding upon him; on the further ground that there has been no *prima facie* case of conspiracy established.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

EXCEPTION No. 13.

Mr. BONSALL.—Q. I show you this paper and ask you if you ever saw that before?

A. Yes, sir.

Q. Where did you find that?

Mr. SMITH.—Let us get the date first.

Mr. BONSALL.—Q. When did you find it?

A. October 2, 1924.

Q. Where did you find it?

A. In that gray book.

Q. At 1249 Polk Street, in the city and county of San Francisco, California? A. Yes, sir.

Mr. BONSALL.—I will now offer this statement in evidence. I will read it to the jury at this time.

Mr. SMITH.—To which, of course, we object, may it please the Court, upon all of the grounds heretofore urged with respect to the other papers and documents that were seized, upon the ground that it is hearsay as to the defendant Marron; upon the further ground that no *prima facie* case of conspiracy has been as yet established, and that it is

(Testimony of W. F. Whittier.)

inadmissible as evidence for the reasons heretofore urged.

The COURT.—Objection overruled.

Mr. SMITH.—Exception. [97]

Mr. BONSALL.—This reads as follows:

"September 1924. Sales 5624.50. Sales Cigars 5.65, Sales Slot machines 254.00. Total Receipts 5884.15. Cost of Goods Sold 3331.60. Gross Profit 2552.55. Expense Salaries 840.00. Rent 100.00. XXXXX 170.00. Janitor 30.00. Miscellaneous 155.95. New Furniture 69.50. Total Expenses 1365,45. 1187.10. E. M. 600.00. Profits after All Salaries & Expenses $587.10 E. M. proportion 293.55. G. B. proportion 293.55.

"George B. Salary 600.00 George B. ½ above 293.55. George B. 893.55. George B. has drawn 430.00. George B. has coming 443.55."

Q. I show you this bottle.

Mr. SMITH.—Now, your Honor, so that we might conserve time, may the objection that I have offered to all of the evidence, documentary and otherwise, that has been heretofore introduced, be considered as being renewed at this time to all of the evidence concerning these exhibits?

The COURT.—You are now referring to the liquor, are you?

Mr. SMITH.—To this bottle.

The COURT.—Very well. The objection is overruled.

Mr. SMITH.—Exception.

(Testimony of W. F. Whittier.)

EXCEPTION No. 14.

Mr. BONSALL.—Q. I show you this bottle marked "Chemist's No. 27936" and with the label saying "Officers Whittier, Lee, Howard, Eldridge," and ask you if you ever saw that before.

A. Yes.

Q. Where did that come from?

A. 1249 Polk Street.

Q. It was labeled in your presence?

A. Yes, sir.

Q. Was this bottle taken to the chemist?

A. It was.

Q. To the United States Chemist?

A. Yes. [98]

Mr. BONSALL.—I offer this in evidence for identification as Government's Exhibit next in order.

(The bottle was marked U. S. Exhibit 10 for identification.)

Q. You don't know the contents of that bottle, do you, Mr. Whittier, at the time you seized it?

A. I think it says on the label.

Mr. SMITH.—Q. Did you make out the label, Mr. Whittier? A. No.

Mr. SMITH.—Then we object to it.

The COURT.—Q. What does it say on the label?

A. I mean the label on the bottle. I think it says "Canadian Whiskey."

Mr. BONSALL.—I think it shows up here in the upper left-hand corner, "Port."

(Testimony of W. F. Whittier.)

A. (Continuing.) No, I don't know anything about that.

Mr. SMITH.—We object to anything appearing on the label upon the ground it is immaterial, irrelevant and incompetent.

Mr. BONSALL.—All right.

The COURT.—I presume the label is a part of the exhibit, isn't it?

Mr. BONSALL.—It is, your Honor.

The COURT.—The objection is overruled.

Mr. SMITH.—Note an exception.

Mr. BONSALL.—Q. I show you this bottle marked "U. S. Internal Revenue Chemist No. 27937, Officers Whittier, Lee, Howard and Eldridge," and ask you if you ever saw that before?

A. Yes, sir.

Q. Where did that come from?

A. 1249 Polk Street.

Q. What date?

A. On the 2d day of October, 1924. [99]

Q. Do you know what part of the premises it came from?

A. I think in that kitchen. I think it was all in there except the home brew beer, if I remember right.

Q. Was this taken to the United States Chemist?

A. Yes, sir.

Q. You don't know the contents of this other than what the label says? A. That is all.

Mr. BONSALL.—This will be offered for identification as Government's Exhibit next in order.

(Testimony of W. F. Whittier.)

(The bottle was marked U. S. Exhibit 11 for Identification.)

Q. To save time, I will show you these three bottles at one time. Look at this one: Did that come from 1249 Polk street, on October 2d?

A. Yes, sir.

Q. It was labelled in your presence?

A. Yes, sir.

Q. And taken to the United States Government Chemist? A. Yes, sir.

Q. I show you this bottle marked "Chemist's No. 27940," and ask you if that was found at 1249 Polk Street on October 2d, 1924. A. Yes, sir.

Q. That was likewise taken to the Government Chemist? A. Yes, sir.

Q. I show you this bottle marked "Chemist's No. 27939," and ask you where that was found?

A. That is the champagne.

Q. Do you recall what part of the building the champagne was found in?

A. That was not in the back, either; that was in the front, in a closet in the front room.

Q. Was it the same closet where the grey ledger and the currency were found, or underneath it?

A. It was not up in the same place; it was down under the floor.

Q. Under the floor? A. Yes.

Q. And there was a trap leading from the place where the ledger was found to where the champagne was found?

A. There was a little hole in the floor. [100]

(Testimony of W. F. Whittier.)

Q. And there was some champagne under there?

A. Yes.

Q. There was a trap-door there? A. Yes.

Mr. BONSALL.—I ask that this be offered for identification, these three, and that they be given separate numbers.

(The bottles were marked U. S. Exhibits 12, 13 and 14 for Identification.)

Q. Regarding the furnishings of that place, 1249 Polk street, will you tell the Court and jury what the principal furnishings were?

Mr. SMITH.—We object to that on the ground that that question has been fully answered already.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

A. I stated that yesterday. The front room, I won't say for sure whether it was a davenport, or not. There were chairs in there. I would call it a davenport. Then in the room where this closet was there was a table and chairs. In the room behind the other front room was tables and chairs. In the rear, I don't know whether it was a folding bed there, or not, I won't say for sure. The kitchen—I would call it a serving-room.

Mr. BONSALL.—I want to ask the Court's indulgence in view of what the testimony has been to ask a leading question of this witness.

Q. Were there any slot machines found there?

Mr. SMITH.—We object to that as highly improper and is asked only for the purpose of

(Testimony of W. F. Whittier.)

prejudicing the defendant. He is not charged here with violating any law prohibiting the use of slot machines.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

A. Yes. [101]

Mr. BONSALL.—Q. How many slot machines were there there?

Mr. SMITH.—The same objection.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

A. I will have to look at that book again.

Q. More than one?

A. Yes. I can't remember whether it was either three or four, to be exact. I won't say for sure on that.

Q. Did you talk with these ten or twelve people that you found in there at the time of the raid?

A. I tried to—

Mr. SMITH.—Just a moment. We object to that, your Honor, on the ground that it is hearsay.

Mr. BONSALL.—Q. (Continuing.) In the presence of Mr. Birdsall.

Mr. SMITH.—The same objection. Any statement made by anybody in that place would not be binding on the defendant Marron.

A. Birdsall was in the back, I think.

Cross-examination.

(By Mr. SMITH.)

The WITNESS.—I think it was Lee, Eldridge

(Testimony of W. F. Whittier.)

and Howard who were with me when I went there on the second day of October. I don't know whether it was the driver Caminolli, or whether it was another driver by the name of Lundy, who was there the first time. I think it was Lundy the first time.

Q. How many of those agents are still in the service?

Mr. BONSALL.—Now, just a moment, we object to that as immaterial, irrelevant and incompetent.

The COURT.—Objection sustained.

Mr. SMITH.—Exception.

The WITNESS.—(Continuing.) I don't know if anybody was with me at the time I found the book. [102] I didn't think anything of the book, to tell you the truth. I won't state that I found the book myself or that it was found by someone else and then called to my attention. I think Howard found the book, I if I am not mistaken. I am not positive whether Howard found the book, or whether I found it. I think Howard brought it in. I don't know whether I found it and then threw it on the table after asking Birdsall if that was not his name. I think I went to the closet first where this book was found. Birdsall gave me the key. I told him I wanted the keys. I handed him the search-warrant and let him read it. I either told him I wanted the key or I told him to open the door. I could not tell you whether it was Mr. Howard that got the key for that closet.

(Testimony of W. F. Whittier.)

I would have to look at that book again to be exact. Agent Howard and I went in there to where we found the champagne in the closet in the front room. I know where the book was found, all right, but I don't know whether I found it, or whether Agent Howard found it. I know it was there.

Agent Howard is now in the Leavenworth Penitentiary. I am no longer in the service. I have been out of the service since last October. There was a new administrator come into the service. Everybody in the service was instructed from Washington to resign when this new man took charge, and my resignation was accepted. I was not asked for that. I was not asked to send in my resignation. Everybody was. There was no reflection on me whatsoever.

Mr. SMITH.—Q. Mr. Whittier, I show you a copy of a warrant dated October 1st, issued by Commissioner Hardie, supported by an affidavit made by C. A. Howard, the affidavit being dated October 1, 1924, and I ask you if you have ever seen that instrument before, and, if so, when and where? A. Yes, I saw it.

Q. When?

A. They handed it out to me, I think, on the 2d of October. I think on the second of October. The agent in charge, [103] Mr. Shurtleff, gave it to me. It was not given to me by the Commissioner himself. Agent Shurtleff gave it to me.

(Testimony of W. F. Whittier.)

Q. What instructions, if any, did Mr. Shurtleff give you?

Mr. BONSALL.—That makes no difference, because it is an absolute mandate of the Court requiring the officer to serve it.

The COURT.—Objection sustained.

The WITNESS.—(Continuing.) It was by virtue of this warrant that I went to 1249 Polk Street.

EXCEPTION No. 15.

Q. While you were at 1249 Polk street everything you did while there you did under and by virtue of the authority vested in you by that warrant?

Mr. BONSALL.—The warrant speaks for itself. The return speaks for itself. I object to the question as immaterial, irrelevant and incompetent.

The COURT.—It calls for the conclusion of the witness. The objection is sustained.

Mr. SMITH.—Exception.

EXCEPTION No. 16.

Q. Mr. Whittier, at the time that you seized these bottles that have been introduced in evidence, did you seize those bottles under your general authority as a prohibition agent, or did you seize those bottles under and by virtue of the special authority vested in you by this warrant and granted to you by the warrant?

Mr. BONSALL.—Just a moment. The return on the search-warrant speaks for itself.

The COURT.—Objection sustained.

Mr. SMITH.—Exception.

(Testimony of W. F. Whittier.)

Q. Mr. Whittier, at the time you seized Plaintiff's Exhibit No. [104] 1 and the other papers and memoranda that have been introduced in evidence here and marked U. S. Exhibits 2 to 9, were you acting under and by virtue of the authority granted you in this warrant, or were you acting under your general authority as a prohibition agent?

Mr. BONSALL.—We object to that as calling for the conclusion of the witness, and as immaterial, irrelevant and incompetent, and the warrant speaks for itself.

The COURT.—Objection sustained.

Mr. SMITH.—Exception.

EXCEPTION No. 17.

Q. Mr. Whittier, at the time you took the book and the papers that I have heretofore referred to, did you at any time ever make a return to a United States Commissioner showing that you had seized those books and papers under that warrant?

Mr. BONSALL.—Again I submit that the return on the search-warrant speaks for itself.

The COURT.—Objection sustained. As I understand it, this book was seized when Birdsall was arrested.

Mr. BONSALL.—That is correct, your Honor, according to the testimony, and not seized by virtue of the search-warrant.

Mr. SMITH.—I think we ought to have the

The COURT.—You know what the ruling was

(Testimony of W. F. Whittier.)

in the higher court on that. Why waste time on that?

Mr. SMITH.—There may be some matters developed in this trial that were not developed at the former trial.

The COURT.—It is a fact, nevertheless, that the book was seized at the time of Birdsall's arrest. There is not any question about that, is there?

Mr. SMITH.—There is no question but what the book was seized [105] on the 2d of October. I am trying to find out from the witness the time and the circumstances under which it was seized. That is the purpose I have in asking the question.

The COURT.—This witness stated very clearly yesterday that Birdsall was arrested and that this book was seized at the time.

Q. Isn't that so, Mr. Whittier?

A. Yes, sir.

Mr. SMITH.—Haven't I a perfect right to cross-examine this witness on the matters he testified to on his direct examination?

The COURT.—Yes, you may, but you are asking him for his conclusion.

Mr. SMITH.—I am asking him for the fact. The Court seems to be in disagreement with me on the matter.

The COURT.—Yes, I am.

Mr. SMITH.—At this time I ask that the search-warrant I showed the witness, supported by the affi-

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(Testimony of W. F. Whittier.)

davit of C. A. Howard, and dated October 1, 1924, be introduced in evidence and marked Defendant's Exhibit "A."

The COURT.—It may be admitted and so marked.

(Thereupon the document was introduced in evidence as U. S. Exhibit "A.")

Said exhibit was and is in the following words and figures, to wit:

(Here insert exhibit.)

Mr. SMITH.—Together with the return that appears on the reverse side thereof.

The COURT.—Yes. What is your point—that the return does not show the gray ledger?

Mr. SMITH.—Yes, your Honor.

The COURT.—All right.

The WITNESS.—(Continuing.) The book was found on a shelf, and was not in the same room that the liquors were. The champagne [106] was in a trap down under the floor in the closet. I don't know whether Birdsall asked me or asked Howard, or somebody else not to take the book. I believe he stated, "You don't have to take that book, do you?" I don't remember who he asked. I didn't take the book to be exact. I think Howard brought the book in. That is the best of my recollection. It was brought in by the officers. I was there with the agent who took it.

Mr. BONSALL.—I will now read Government's Exhibit No. 1 in evidence.

On page 21 appears: "E. Marron $500; Rent

$100; W. Brand $500." That is under date of August 31, 1923.

On page 31, under date of October 1st is the following:

"W. Brand $408.97. E. Marron, $603.08." That makes a total of $1,012.05.

On page 36 it says: "Bird." with a list of notations. Then lower down on that same page it says: "18–23 Birdsall drew $20." That is crossed out. Underneath that it says: "Drew $20, $20, $20, $20, $20." That makes five 20's.

On page 46 appears the name Birdsall, and then there is an "X" and then the figures 10 at the top of the page.

On page 54 appears, on the left-hand side, "Birdsall," and on the right hand, "Mahoney." There are different items, "Drew 50, Drew $15," and then "Mahoney drew,"—and then there are other items.

On page 61 it says on the left-hand side "Bird," and on the right-hand side, "Mah." "Mahoney" is also written out in full in the right-hand column.

On page 69 we have at the top of the page "March," and on the left-hand side "Birdsall," and on the right-hand side "Mahoney." On the left-hand side appear certain items; "Drew $20"; "Drew $60." Also, "Due Birdsall"; also other [107] items.

On page 75, in the left-hand corner of the page, it says, "Mah" and on the right-hand, "Bird," showing payments on April 7 of $50 to Mahoney,

on the 14th $50, on the 21st $50, on the 28th $50. On the right-hand side "Birdsall drew April 12 $200 April 8 $30, April 14 $20, April 22 $100." Then appears "April 27 Birdsall $100; April 30 $20, April 28 $30. "Total $520." "Due Birdsall $80." The total is $600.

On oage 81, on the left-hand side is "Mah" and on the right-hand side "Bird."

Mr. BONSALL.—After giving the items drawn by Mahoney and by Birdsall, it says on the bottom of the page: "May 28, Shasta $1.20, Ice $1, Seltzer .60, Lemons .50; sugar $1, Ice $1.50, Matches .25, Plumber $2.50, Shasta .60, Ice $1.50, Seltzer .80, Shasta, .80, Lemons and orange, .75." On the right-hand side appears: "Sales $5033.65, less Weldon & Argyle $57.50; $4976.15; Cigars and cigarettes $22.10, making $ 4998.25. Stock $3230. Inventory 5–1 $338.45, making $3,568.45. Inventory 6–1 $160. Then carried out, $3408.45. And underneath that $1589.80. Expenses: Rent $100. Then XXX 170. Painting $41, Salaries $820, Miscellaneous $152.62, Cigars, etc., $31.40. That makes $1315.02. And that amount subtracted from $1589.80 leaves $274.78. Stock ran 158 per cent. Without loss 174 per cent.

The next is on page 87. There is another summary of sales and receipts. I am not going to burden you with the figures at this time. It is substatntially a similar statement to that which I just read to you.

The next is on page 93. "Bird" on the left and

"Mah" on the right. It shows certain amounts of money withdrawn. On the bottom of this page, on the left-hand side appears items [108] like seltzer, lemons, onions, ice, syphon, eggs, water, phone.

On page 94 is shown a profit and loss statement on the right-hand side. Sales $5,570.60. Slot machines $103. Cigars, etc. $4.40. Total $5678.05. Stock $3145.30. Inventory 7–1 $494.97. $3640.27. Inventory 8–1 $418; $3222.27. $2355.78. Expenses janitor $50, salary $920, rent $100, XXXX $180. Miscellaneous $381.36. Electric work, $85. Making $1715.36. Subtracting that from $2355.78 leaves $739.42. E. Marron $620. Balance $119.42. One-half E. M. $59.71. One-half G. B. $59.71.

On page 93 we have the name on the left-hand side at the top of the page "Bird" and on the other side "Mah." On the 28th, no month given, Gorham $60. Then on the right-hand side of the page we have something stricken out, I don't know whether it is meant for Gorham, or not, so I will not say.

On page 105 we have on the left-hand side "Geo." and on the right-hand side "Chas." September 18th $50, September 27th $200, Total $450. On the right-hand side: "September 7, Chas. $60, September 14 $60, September 21 $60, September 28 $60. Total $240."

On page 107 appears this statement. "Change $60"; just over that it says "Sept," and on the left there are two XX's. On the same page ap-

(Testimony of W. F. Whittier.)

pears the following: "September 1924 Profit and Loss. Sales $5624.50, Cigar sales $5.65, Slot machines $254. Total $5884.15. Stock $3342. Inventory 9–2 $485.95. That makes $3827.95. Inventory 10–1 $496.35. That makes $331.60. Subtracted from $5884.15 that leaves gross profit $2552.55. Expenses: Salaries $840, Rent $100, XXXXX $170. Furniture $69.50. Janitor $30. Miscellaneous $155.95. Expenses $1365.45. Profit $1187.10. E. M. $600. Balance to divide $587.10. One-half E. M. $293.55. One-half G. B. $293.55. $587.10. Stock ran 178 per cent. on sales."

Page 34, in the center of the page, appears the following: [109]

"17–23 Gift to Kissane $5"; above the name "Kissane" is written the word "Police."

Page 51 appears the following: "Police $100. Kissane $5."

On page 60 we have: "Kissane," on the 10th, "$5."

Page 68, "Kissane $5 March 9th; Kissane $5 16th; Kissane $5 23d; Kissane $5 30th."

On page 74, April 6, Kissane $5, April 13th gift $5, April 20th Gift $5, April 27th, Kissane $5.

On page 80 we have other items of the same nature.

On page 92 the same.

On page 98 the same.

On page 104 the same.

On page 69 we have some items: "Gift $60, March 19, 1924. New Police $90.

Page 74, Gift $90 on the 16th. On the 27th Gift $60.

On page 8, Police on the 22d $90. On the 26th Police $60.

Page 86, June 14, Police $150.

Page 92, Gift $150.

Page 104, September 15, Gift $150—it might be $130.

On page 123 we have a list of stock on hand including whiskey, wine, sherry and gin—quite a long list, but I will not take the time to read it.

On page 101 we have a profit and loss statement for August, 1924, showing a net profit of $796.95. E. M. $620. Balance $176.15. One-half E. M. $88.33; one-half G. B. $88.32.

On page 94 we have the same kind of a recapitulation for July, 1924

On page 71, for the month of March, we have a stock account showing the different stock on hand at the end of March.

On page 64, February 29, stock on hand, including bourbon, Scotch, rye, vermuth, gin, Plymouth, brandy, beer, sherry. [110]

On page 92 the name "Gorham" appears $60 with some lines drawn through it.

Mr. SMITH.—That is scratched out?

Mr. BONSALL.—Yes, that is scratched out.

On page 93 the name "Gorham" appears $60. On the same page Joe Gorham $60.

Mr. SMITH.—And that is scratched out?

Mr. BONSALL.—Yes, that is scratched out. But here it is not scratched out.

TESTIMONY OF G. L. LEE, FOR THE GOVERNMENT.

G. L. LEE, a witness called for the United States, and sworn, testified as follows:

Direct Examination.

(By Mr. BONSALL.)

My occupation at the present time is a salesman. I was formerly employed as a Federal Prohibition Agent. From February 5, 1924 to October 19, 1925. I recall while such prohibition agent visiting the premises 1249 Polk Street, on the 2d day of October, 1924, in the City and County of San Francisco, State of California. I went there with the agents Whittier and Eldridge and the driver Carmona. The driver rang three bells which was supposed to be the signal to get in, three bells at the front door. We had a search-warrant. Those premises are on the west side of Polk St. near Bush. We entered through the front door and went up a flight of stairs. It is a flat of, six or seven rooms, about seven rooms. On entering we all went upstairs. I went to the rear of the premises, in what used to be the kitchen. There was no stove or anything in the kitchen. There we found in the ice-chest—there was not any stove [111] in the kitchen. There was no furniture there. There were no beds in the place. There was a davenport. I believe, in the front room. I saw the davenport later. There were tables and chairs. Slot machines and a cash register. Two

(Testimony of G. L. Lee.)

slot machines that I remember of. I made a thorough search of the premises. I did particularly the kitchen, that end of the house. I inspected the back porch. There were no stairs from the back porch directly into the back yard, and no stairs up. To go to the back porch you had to go through these premises.

Q. What did you find on the back porch?

Mr. SMITH.—We object to that as assuming something not in evidence.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

The WITNESS.—(Continuing.) We found I don't know how many thousands of empty bottles, liquor bottles, beer, and whiskey, and so on. I found intoxicating liquors on those premises on October 2, 1924. I found some in the ice-chest and some in the pantry, what used to be the pantry. It was whiskey and wine, and gin, and Canadian Rainier beer. I have not got the quantity I found there now, but there was quite a quantity though. I am familiar with the taste of whiskey, but I don't think I tasted any of that. I knew from the smell that it was whiskey. I did not taste any of the wine. I smelled the wine. From my experience I would say that it was intoxicating wine, and the same with the whiskey.

The attention of the witness was here directed to Government's Exhibits 12, 10, 14 and 13 and 11 for identification.

(Testimony of G. L. Lee.)

The witness thereupon identified these exhibits.

The WITNESS.—(Continuing.) The liquor I found came from the ice-chest and the pantry at 1249 Polk Street, in the city and county of San Francisco, State of California. [112]

These bottles were labeled in my presence. Eldridge made the labels and they were taken to the United States Chemist. I did not search the front room of those premises.

Mr. SMITH.—That is leading and suggestive.

Mr. BONSALL.—It may be, but I am trying to save time.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

The WITNESS.—(Continuing.) After I was there on the raid some little time I went to the front room and saw a trap in the closet. I saw the book that is now in evidence as U. S. Exhibit No 1, but at the time I entered the premises, if I remember right, there were at least five or six people in the place. Some were in the rooms. I don't remember seeing anybody drinking though. I would not say whether they were drinking or not. I don't remember whether there were any glasses on the tables, when I was there, because I went directly to the kitchen and came in afterwards. The other agents went into the front room.

Cross-examination.

(By Mr. SMITH.)

I don't remember if Agent Howard was there or

(Testimony of G. L. Lee.)

not. I have my book here and I can tell you who was with me. Howard was along; Howard, Eldridge and Whittier were with me. I searched the kitchen and dining-room, next to the kitchen. The name of the driver who took me there. I have not put his name down, but I think it was Carmona. I don't think I tasted any of the property that was seized. I don't think I did. The only time I would ever do that was where I would find red wine, and on the chance that it might be vinegar I would taste it. That is the only time I would taste it.

On that day I arrested George Birdsall. Mr. Marron was not in the premises. I didn't see him.

[113]

TESTIMONY OF FRED CARMONA, FOR THE GOVERNMENT.

FRED CARMONA, a witness called for the United States, and sworn, testified as follows:

Direct Examination.

(By Mr. BONSALL.)

Q. Do you recall driving to the premises at 1249 Polk Street in the City and County of San Francisco, State of California, on October 2, 1924?

Mr. SMITH.—Now, just a second. We object to the question upon the ground that it is leading. While it is true that some questions might be overlooked because of the fact that they are leading or suggestive, I think that the objection properly

(Testimony of Fred Carmona.)

applies to this question, because it is putting the answer that is desired right into the mouth of the witness.

The COURT.—Objection overruled. I don't think that that will do any harm to the defendant.

Mr. SMITH.—Exception.

EXCEPTION No. 18.

A. I don't recall just exactly what date it was, but I do remember that I drove the raiding squad to those premises at about that time.

Mr. SMITH.—I move to strike that out as not responsive.

The COURT.—Motion denied.

Mr. SMITH.—Exception.

The WITNESS.—(Continuing.) Agents Lee, Whittier and Howard were with me. I went into the premises. They sent me up to give the usual signal, whatever it was, which I did, and the other agents were one on one side and one on the other side. The signal was so many bells. I rang the bell so many times.

Cross-examination.

(By Mr. SMITH.) [114]

I didn't keep any record of the date, or any notes on it at all. I don't know just exactly what date it was. As far as I know, it may have just as well been October 3 as October 2.

Mr. SMITH.—In view of the statement of the witness, your Honor, I ask that all of his testimony be stricken from the record.

(Testimony of Fred Carmona.)

The COURT.—Motion denied.

Mr. SMITH.—Exception.

The WITNESS.—(Continuing.) We arrested George Birdsall on that day.

TESTIMONY OF GEORGE E. ELDRIDGE, FOR THE GOVERNMENT.

GEORGE E. ELDRIDGE, a witness called for the United States, and sworn, testified as follows:

Direct Examination.

(By BONSALL.)

I was formerly a Federal Prohibition Agent; from the 25th of August, 1924, to the 20th day of July, 1925. I had occasion to go to the premises at 1249 Polk Street, in the City and County of San Francisco, State of California, in the month of October, 1924, On the second day of October, I went there with agents Whittier, Lee and Howard. We had a search-warrant for those premises. We went up there and the signal was given and we were admitted and went upstairs and searched the place and found quite a quantity of liquor. I went to the back porch and found a great many empty bottles. I don't know if I smelled them or not. I don't remember. They were all kinds of bottles. I don't know how many there were. There were too many to count. There was not a stairway leading up and down from the back porch. I had to go through the premises to reach the rear porch. As I remember it, there were two rooms across the front

(Testimony of George E. Eldridge.)

and two rooms across the back, and two rooms connecting [115] them on the side. One of the front rooms was furnished with overstuffed furniture, but I am not clear as to what was in the other room. In the back rooms, one was fixed up as a kitchen and the other more or less as a dining-room, I should say. The two connecting rooms had a small amount of furniture in them. I did not see any beds. At the time I was there there were some guests and some slot machines; four slot machines, I believe. I don't know how many people were there at the time of the raid. I don't believe I made a note of it. I was in there on two days. I am not sure how many people were there on the first day, There were people in there. There were some refreshments in front of them. I don't know if it was intoxicating liquor. I did not taste it. I did not smell it. Not the stuff that was gotten in front of them. I don't recall the color. It was being served in glasses. Not whiskey glasses. They were tall glasses. They looked like a two-ounce glass instead of the usual one-ounce glass. I found liquor on the premises. There was some in the ice-box in the kitchen, some in the closet in the kitchen, some in a closet in the hall, and some in a trap in a closet in the front room.

EXCEPTION No. 19.

Not any on the back porch that I recall. I have a list of the quantity that we found there.

Q. Will you read it.

(Testimony of George E. Eldridge.)

A. 16 pint bottle champagne. 9 one-fifth gallon bottles white wine—

Mr. SMITH.—Just a minute. We submit that the search-warrant that is in evidence is the best evidence of what was found.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

A. (Continuing.) 16 pint bottles champagne; 9 one-fifth gallon bottles white wine; 5 one-fifth gallon bottles whiskey; 2 one quart bottles whiskey; 1 one-fifth bottle gin three-quarters full; 1 [116] one-fifth gallon bottle gin full; 2 bottles Bicarde rum; 1 one-fifth gallon bottle brandy; 2 one-fifth gallon bottles Scotch whiskey; 1 one-fifth gallon bottle one-half full Scotch whiskey; 1 bottle vermuth; 1 bottle pecan, one-third full; 1 one-gallon bottle three-quarters full gin; 8 bottles sweet wine; 1 bottle one-third full whiskey; 1 gallon bottle one-sixth full sweet wine; 2 sacks Canadian beer; 3 cases of home brew.

I smelled the liquor that was there. I smelled some whiskey. I am familiar with the smell of whiskey. I would say that it was intoxicating liquor. The beer and the whiskey. I know from my past experience that there were both beer and whiskey. There were samples taken on the premises.

The attention of the witness was directed to the five bottles marked Government's Exhibits 11, 10, 12, 14 and 13, for identification.

(Testimony of George E. Eldridge.)

The WITNESS.—(Continuing.) These are the bottles that were found there. They were labeled by me and taken to the United States Chemist. I found champagne there. I was not in the room when the champagne was found. There was a trap there. I have the champagne listed in my book.

Mr. BONSALL.—Q. Calling your attention to United States Exhibit 1, did you see that on that day?

A. Yes, sir.

Q. In those premises? A. Yes, sir.

Cross-examination.

(By Mr. SMITH.)

I am no longer connected with the Prohibition Department. I am sure it was the 2d day of October that I went to the premises. We were there on both the 2d and the 3d. We arrested Birdsall, I believe. Mr. Birdsall on the 2d day of October.

Redirect Examination.

(By Mr. BONSALL.)

I am testifying now as to the first visit, on October 2d, [117] 1924. I have not my notes here about the 3d.

TESTIMONY OF EDWARD O. VAUGHN, FOR THE GOVERNMENT.

EDWARD O. VAUGHN, a witness called for the United States, and sworn, testified as follows:

Direct Examination.

(By Mr. BONSALL.)

My business is that of an accountant. I have been such for about 20 years. I know Mr. Birdsall, one of the co-conspirators in this case. I have known him 12 or 15 years, I should say. In the first part of January and the first part of the year 1924, I think I had occasion to visit 1249 Polk Street, in the City and County of San Francisco, State of California. I believe it was in the early part of 1924. I saw Birdsall at that time.

EXCEPTION No. 20.

Q. Did you have any talk with him with reference to the accounts that he was keeping there at that time?

Mr. SMITH.—We object to that as immaterial, irrelevant and incompetent and not binding on the defendant Marron.

The COURT.—What date was it?

Mr. BONSALL.—In the early part of 1924.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

The WITNESS.—(Continuing.) Yes, I had a talk with him at the time that I was there.

Mr. BONSALL.—Q. What did he ask you to do?

(Testimony of Edward O. Vaughn.)

Mr. SMITH.—We object to that as assuming something that is not in evidence.

The COURT.—Objection overruled.

Mr. SMITH.—Exception. [118]

A. We discussed adding up the book.

EXCEPTION No. 21.

Mr. SMITH.—So that our record may be complete on this matter, if the Court please, and so that I will not unnecessarily delay matters with objections, I object to all testimony elicited from this witness with respect to United States Exhibit No. 1. May the objection be considered as made at this time that was heretofore made, all of the objections made orally, and all of the objections contained in our petitions to suppress?

The COURT.—Yes. The objection is overruled.

Mr. SMITH.—Exception.

EXCEPTION. No. 22.

Mr. BONSALL.—I show you Government Exhibit No. 1 and without comment ask you to state if you recognize that book. You may look inside it.

A. I have seen it before.

Q. Now, without comment, I show you this sheet of paper marked U. S. Exhibit 9, and ask you if you have ever seen that before.

Mr. SMITH.—The same objection, your Honor.

The COURT.—I understand it goes to all the evidence.

(Testimony of Edward O. Vaughn.)

Mr. SMITH.—It goes to all the documentary evidence.

The COURT.—Yes, all that was handed to this witness.

Mr. SMITH.—Yes, your Honor.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

A. Yes, sir.

The WITNESS.—(Continuing.) I know whose handwriting that is. That is my handwriting. I presume the entries on Government's Exhibit No. 9 are made from the book. That is my recollection. I must have gotten the figures from the book. Not all of the entries in Government's Exhibit No. 9 are in my handwriting. I would have [119] to go through the book. I might have put some totals in here from time to time. Mr. Birdsall employed me at the time I came there to summarize the book and the figures. That is not the book he employed me to keep. No, I never was employed to make entries in the book but to add up the book and make a summary, to prepare a statement of profit from the book. I would have to check the figures back. I will have to refer to this to find out what month I started keeping the accounts or making the summaries from this book, because I don't recall. I see some figures in my writing at the end of January. I presume 1924. September of that year seems to be the last. On page 86 of the Ledger, at the top of the page the name of "Mis." is given. I am not sure whether there is a page in there with

(Testimony of Edward O. Vaughn.)

the name of Vaughn on it. Q. Here it is. It is right on page 86. A. I thought you said up at the top. The entry is "Vaughn $10." I wrote that, and I was paid the $10 for the services I rendered. I notice on page 81 three "X's," opposite which are the figures 170.

EXCEPTION No. 23.

Q. Will you explain to the jury the significance or the meaning of those three cross-marks?

Mr. SMITH.—We object to that as calling for the opinion and conclusion of the witness, and as assuming something that is not in evidence. This witness has not testified that they signify or mean anything.

The COURT.—Objection overruled. You can state, if you know.

Mr. SMITH.—Exception.

The WITNESS.—(Continuing.) There were certain items there that we put together and marked an "X" opposite that. The items that went to make up the 170 opposite the three cross-marks I [120] believe they were called gifts and police items entered in the details. Gifts and police. That is my recollection. I presume they are the same items marked in that book "Kissane" and "Police." There are some little check marks here that I have checked off and I think they total up that item.

EXCEPTION No. 24.

Mr. BONSALL.—Q. Did you have any instructions from Mr. Birdsall with reference to making up that particular item?

(Testimony of Edward O. Vaughn.)

Mr. SMITH.—We object to that on the ground that if he did have any such instructions they would not be binding on the defendant Marron.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

The WITNESS.—(Continuing.) I have had instructions, otherwise I would have summarized them under those various headings. I don't recall those instructions. I was told to make them in one lump sum; that would be my recollection, now. I was not given any reason why they were shown that way. On page 87 of Government's Exhibit 1, some of that is in my handwriting. The summary on that page is in my handwriting. All of it, I believe is. I notice in that summary appears three cross-marks with the figures 195. They are in my handwriting. I see some checks in the month of June accounts that indicate that I checked them off, making that 170. Those items would be the same kind of items, Kissane and Police and Gifts. I notice the summary on page 94 for the month of July, 1924. That is in my handwriting. There are four cross-marks on page 94, with 180 written opposite them. I presume the same kind of items went to make up that 180. They were all handled the same way every month. I presume when I say the same kind of items I mean "Gifts," "Kissane," "Police." The summary for the month of [121] August on page 101 is in my handwriting. I notice in that summary there appears an item with three cross-marks, and the sum of $180 opposite them.

(Testimony of Edward O. Vaughn.)

Undoubtedly that is made up from like items—"Kissane," "Gifts," "Police," because we were doing the same each month, and the crosses stood, in general, for that kind of entries—"Kissane," "Gifts," "Police." I notice the summary on page 107 in that ledger, for September, 1924. That is all in my handwriting. On that page appear five cross-marks with the figures 170 opposite them. Those five cross-marks and the sum of $170 represent items "Kissane," "Police," and "Gifts," for the month of September made up as the other months were. Government's Exhibit No. 9, which I have in my hand, is a copy of page 107. It seems to be a copy taken from Exhibit No. 1. I must have copied it from there. It is in my handwriting. I must have copied it from the book. I know of no other place where I could have got it. I could not say that the statement represents a summary of profit and loss for the month of September at 1249 Polk Street, in the City and County of San Francisco, State of California. It is a copy of this summary and the summary was prepared from this book. I was adding up the book when I made it. I didn't write "summary." I could not say that in September, 1924 "sales" refers to sales at 1249 Polk Street. Those items were taken from this ledger. I remember testifying at the last trial.

Q. I am reading from page 115 of the transcript in that case—

Mr. SMITH.—Now, just a second. I suggest that the proper method be followed.

(Testimony of Edward O. Vaughn.)

Mr. BONSALL.—I can bring the stenographer in that took this.

The COURT.—Just show it to the witness and make it short. This is a transcript of your testimony taken at the former trial. Read it. [122]

Mr. BONSALL.—Q. I will read you this question:

"Q. Is that a profit and loss statement?

"A. Yes, it was intended for that."

Was that statement correct at the time it was made? A. Yes. It was a profit and loss statement.

Q. For September, 1924? A. Yes.

Q. Now, will you turn to pages 80 and 81 of Government' Exhibit No. 1. At the top of page 80, under date of May 19, 1924, you will find an item, "Government fine $500." Then on the opposite page, that is, on page 81, there is written, "One-half fine $250." Have you that place? A. Yes.

Q. Is that in your handwriting?

A. On page 81 it is *is.*

Q. Will you tell me what that indicates?

Mr. SMITH.—If he knows.

A. It is under the heading "Bird"—I suppose that is Birdsall.

The WITNESS.—(Continuing.) I don't know whether that is in reference to the $500 on page 80. I added $250 to his account for some reason, but I cannot recall why. I would think that the $250 is charged to Birdsall—or "Bird," as it is stated here. I am an expert accountant.

(Testimony of Edward O. Vaughn.)

Q. Can't you tell that your statement came from that book?

EXCEPTION No. 25.

Mr. WISEMAN.—We object to that, your Honor, as immaterial, irrelevant and incompetent, and as an attempt to cross-examine his own witness.

The COURT.—Objection overruled.

Mr. WISEMAN.—Exception.

A. Yes, this statement came from the book.

EXCEPTION No. 26.

Mr. BONSALL.—Q. How would you be able to make a statement of profit and loss in the month of September, 1924, without [123] knowing what items you were including in that statement?

Mr. WISEMAN.—The same objection.

Mr. SMITH.—And I think the question assumes something that has not been stated by the witness.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

A. I made the statement from the book, yes. I must have got instructions to charge that under the "Bird" account; "One-half $250, to the name of "Bird." I presume from the $500 Government fine. I don't know. I can't remember that. As I recall it, I went there to make up those books around or shortly after the first of the month. Mr. Birdsall was there almost always, when I went there. I talked to Birdsall occasionally about making up these items in the book. I saw defendant, Eddie Marron, there. I believe I used to go in the front room where there was nobody coming in or

(Testimony of Edward O. Vaughn.)

out, and I would be undisturbed. I don't think that Mr. Birdsall and Mr. Marron both went into that room always. There were times when they were in that room with me when I was making up that statement. "Q. Both of them?" "A. I would not say at the same time. I don't know —probably they were." That book was given to me to work from when I went there. I suppose Birdsall gave it to me, or if he was not there it may have been left there and I would get it. I don't know that Mr. Birdsall told me to make the balance every month, but originally Birdsall did. I don't know that he told me that every month. I used to go there for that purpose. Nobody else ever told me to keep up the book. I received instructions regarding keeping that book from Birdsall—all of them. I find in Government Exhibit No. 9, in evidence, that there was an item there "Slot machines $254." I don't know where I got that item to make that figure from. I notice on page 116, from the summary for September, 1924, I used it on the September statement. That is right, the date here. There is an [124] item in Government's Exhibit No. 9, "Salaries": I find that item here. That item is $840.00. I believe the salaries in that sheet appear in Government's Exhibit No. 1. I believe they do. The greater part of it. I see an item here 240, leaving $600. It must have been $20 a day salary, charged for Birdsall under that item.

Q. At the time you made up that statement, some-

(Testimony of Edward O. Vaughn.)

body gave you instructions how much to charge a day for salary for Mr. Birdsall, did they not?

Mr. SMITH.—That is assuming something not in evidence, something that has not been testified to.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

A. Yes, I think Mr. Birdsall told me to charge $20 a day for his salary.

The WITNESS.—(Continuing.) Birdsall's salary was $600.00. I see an item here under the heading "Charles." I believe there was a fellow there by that name. I remember Charley Mahoney. I am not sure. I think that was meant for him. I don't know whether he was one of the co-conspirators in this case. I was present at the last trial.

Q. Did you see this same Charles in the court-room at the last trial?

Mr. SMITH.—We object to that as immaterial, irrelevant and incompetent.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

EXCEPTION No. 27.

Mr. BONSALL.—Q. And he was the Charles Mahoney who was employed there? A. Yes, sir.

Q. And he was a defendant at the last trial? [125]

Mr. SMITH.—The same objection.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

A. I believe he was.

(Testimony of Edward O. Vaughn.)

The COURT.—He is named in the indictment, isn't he?

Mr. BONSALL.—Yes, he is named in the indictment.

EXCEPTION No. 28.

Q. Referring to Government Exhibit 9, on that statement appear the letters "E. M." with the figures 600 opposite them. Do you know what those two letters—"E. M." refer to?

A. Well, I suppose, E. Marron.

Mr. SMITH.—I ask that that answer go out. He says, "I suppose."

The COURT.—Motion denied.

Mr. SMITH.—Exception.

Mr. BONSALL.—Q. Is that the statement that you drew up? A. Yes, sir.

Q. Do you know what "E. M." refers to?

The WITNESS.—(Continuing.) At the time this was going on, when I made these statements, Mr. E. Marron was in there, in and out, he had some dealings there, just what I don't know, and I think that is what that refers to. I don't know that I testified at the last trial regarding that proposition.

Attention was directed to page 119 of the transcript of the previous trial.

The WITNESS.—Well, that is what I have said here. I said at that time that it referred to Eddie Marron. I still make the same statement. If I said it then it must be true now. I don't recall every figure here at this time, a year or so later. If I testified in January, 1925, in this case, it would

(Testimony of Edward O. Vaughn.)

still be true. No, there is no doubt I said it must refer to Eddie Marron.

I find in Government's Exhibit No. 9, a little further down [126] on that page, the initials "E. M., proportion $293.55." and continuing further I see the initials "G. B., proportion $293.55." E. M. refers to E. Marron, the defendant. G. B. to George Birdsall, one of the defendants in the former trial. I saw him at the last trial and he was a defendant in that trial in January, 1925. The statement shows a profit for the month of $587.10; those two items are 50 per cent each of that. 50% of the profit to Marron and 50% to Birdsall. That is the way the total shown here is divided. Mr. Birdsall must have given me the instructions to divide them that way. I don't recall that he told me anything about how that $600 was to be taken out. I don't recall now just how this is worked out, whether it was to be taken out after expenses had been deducted from the receipts.

The attention of the witness was directed to the transcript, page 120, at the former trial.

Q. Is it correct? A. Yes, sir.

Q. Will you read it to the jury?

A. The question was:

"Q. What did he say with reference to $600, as to when or where it was to be taken out?"

The answer was: "A. After the expenses had been deducted from the receipts then that amount should be deducted and the balance divided between them."

(Testimony of Edward O. Vaughn.)

Q. Will you look at the bottom of page 69 of Government's Exhibit No. 1 in evidence; there is an item on that page that says, "New police $90."

Mr. SMITH.—If the Court please, we object to any statement of counsel as to what that is. That matter was a matter of considerable controversy in the last trial.

Mr. BONSALL.—Well, it looks like that.

The COURT.—Counsel says it looks like it. We will let it go at that. [127]

Q. Do you know what it is?

A. I don't recall the item now.

Mr. BONSALL.—Q. Do you remember talking about that item with me just before we came down here? A. Yes.

Q. Do you remember that you said—

Mr. WISEMAN.—We object to that, if the Court please, as an attempt to impeach his own witness, as immaterial, irrelevant and incompetent.

The COURT.—Objection overruled.

Mr. WISEMAN.—Exception.

Mr. BONSALL.—Q. Do you remember you said you did not recall whether that was "Policy" or "Police"?

Mr. WISEMAN.—The same objection.

The COURT.—Objection overruled.

Mr. WISEMAN.—Exception.

A. I recall that.

The WITNESS.—(Continuing.) I see that item there that looks like "policy" or "Police." It seems to be in my handwriting. It is very poorly

(Testimony of Edward O. Vaughn.)

written. I think it is my handwriting. I cannot swear whether that is "New Police," or "New Policy," but it is $90. I recall that item only when I see it there.

EXCEPTION No. 29.

Q. Where did you transpose in any statement that item "New policy"?

Mr. SMITH.—We object to that on the ground that it is assuming that is not in evidence, the witness has not testified he ever transposed it.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

The WITNESS.—(Continuing.) This refers to March. I would not swear that that had not been altered since I entered it. I believe the first time I went to that place at 1249 Polk Street was in the [128] early part of 1924. I purchased drinks in that place. I could not say that I never went in there that I did not get a drink. I bought it from whomever was serving it at the time. I recall Birdsall and Mahoney. I bought from them. I continued from March until September, 1924. I don't know how many times I had a drink in that place. I must have been there six or seven times for the purpose of working on the books.

Cross-examination.

(By Mr. SMITH.)

Q. I show you your testimony given at the last trial, page 125, the beginning of the cross-examination, the first question.

(Testimony of D. E. Mocker.)

Mr. BONSALL.—We will admit Marron never served him with any liquor there.

TESTIMONY OF D. E. MOCKER, FOR THE GOVERNMENT.

D. E. MOCKER, a witness called for the United States, and sworn, testified as follows:

Direct Examination.

(By Mr. BONSALL.)

I am a collector for Umbsen, Kerner and Stevens. I have been collecting for eight or nine years. My duties are those of a collector of rent for that firm. I guess I collected all of the rent for 1249 Polk Street, in the City and County of San Francisco, State of California. I collected rent there on the first of the month; that is, the first couple of days of the month. I don't know offhand. I think we got the property in 1922 and it was from then on. I could not say offhand from whom I collected rent in June, 1923, for that place. I could check it up, though. I remember collecting from Hawkins, but I could not recognize him. I could not say approximately when that was. I have those records. [129] They are a record of the collection of rents at 1249 Polk Street. They are kept in the usual course of business at Umbsen, Kerner & Stevens.

EXCEPTION No. 30.

Mr. SMITH.—We object to any testimony respecting the premises at 1249 Polk Street at a time when Mr. Hawkins was there.

(Testimony of D. E. Mocker.)

Mr. BONSALL.—He is charged as a co-conspirator.

Mr. SMITH.—That may be true. You might charge a dozen people with being co-conspirators. That doesn't mean anything. It is on the ground that there is no showing of any *prima facie* case of conspiracy between a person named Hawkins and a person on trial named Marron. That is the ground we are objecting on.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

A. About the first of May, 1922.

Mr. BONSALL.—Q. How long was rent paid there by Mr. Hawkins, if you know?

Mr. SMITH.—The same objection and upon the further ground that anything that Hawkins might have done would not be binding on the defendant Marron until such time as the Government shows that there is a connection between the two.

The COURT.—That is right. Objection overruled.

Mr. SMITH.—Exception.

A. Up to about the 1st of July, 1923.

Mr. BONSALL.—Q. Then who did you collect rent from at that address?

A. Just a minute, please. That was up to November 1st.

Q. November 1st, 1923? A. Yes.

Q. Then who did you collect from?

A. Collected under the name of Marron.

Mr. SMITH.—We ask that the answer be stricken out as not responsive. [130]

(Testimony of D. E. Mocker.)

The COURT.—Motion denied.

Mr. SMITH.—Exception.

The COURT.—Q. The question was, who did you collect from?

A. The receipt is issued under the name of Marron. I generally called there and if they were out they would leave it with somebody. It was very seldom I ever saw anybody the second time. There was always somebody on the premises.

Q. You made the receipt out in the name of Marron? A. Yes, sir.

Q. Just how did you make it out?

A. Marron; no first name, or anything.

Q. Just Marron?

A. Yes. When we called, if Marron was out he would leave it with somebody else on the premises.

The WITNESS.—(Continuing.) I made the receipt out in the name of Marron. Marron. No first name, or anything, just Marron. When I called if Marron was out, he would leave it for me with someone else on the premises.

EXCEPTION No. 31.

Mr. SMITH.—I ask that the evidence be stricken from the record on the ground that it is immaterial, irrelevant and incompetent, and not in any way binding on the defendant Marron now on trial.

The COURT.—Motion denied.

Mr. SMITH.—Exception.

The WITNESS.—(Continuing.) I saw the defendant, Mr. Marron before. I collected rent from him at that address; about four, I think, three or

(Testimony of D. E. Mocker.)

four. Three or four payments from him personally. Sometime during these dates, that I have mentioned. I would not say just what months they were, but during that time. There was $100 per month paid for those premises. It was paid in cash. I generally stood at the top of the stairway when I made collections. I would ring the bell and they would open the door and I would walk up to the top of the [131] stairs. After Mr. Marron stopped paying rent, nobody paid it,—that is, until it was leased to a different tenant. I had a man in there by the name of Mahoney. I don't know when he went in there. Mahoney paid me several times. I don't know whether we have a lease on record in our office. I couldn't say as to that. The custom is to keep all leases in the office. I have a lease to those premises made in the name of Eddie Marron. I have it with me. I have a photostat copy of it.

Mr. BONSALL.—This shows a lease of the premises 1249 Polk Street, the upper flat, to Eddie Marron, subject to owner's approval, at $100 a month. It is dated November 2, 1923. I will offer this in evidence as the Government's Exhibit next in order, under the stipulation of counsel that a photostat copy may be substituted.

(Thereupon said copy of lease was here introduced in evidence as U. S. Exhibit No. 15.)

Said exhibit was and is in the following words and figures, to wit:

(Here insert exhibit.)

(Testimony of D. E. Mocker.)

Cross-examination.

(By Mr. SMITH.)

To my knowledge, after Mr. Marron ceased paying me rent, I never collected it from anyone else. I collected money from Mr. Mahoney during Mr. Marron's tenancy. I could not say that the last person that I collected rent from was Mr. Mahoney. I could not say who was the last one who paid the rent. The last receipt that was issued was issued in Marron's name.

Q. I call your attention to your testimony on page 8 of Volume 1 and direct your attention to your testimony from that point on.

A. That was Mr. Mahoney.

Q. The last one you received rent from was Mr. Mahoney?

A. Yes, to my knowledge. I would not want to take an oath on it. [132] I could not recall exactly.

TESTIMONY OF EDWARD T. O'DONNELL, FOR THE GOVERNMENT.

EDWARD T. O'DONNELL, a witness called for the United States, and sworn, testified as follows:

Direct Examination.

I am an Area Manager of the Pacific Telephone and Telegraph Co. I have not the records showing the charges against 1249 Polk Street in this city, for 1924. They are in the court; the five documents

(Testimony of Edward T. O'Donnell.)

that I have been shown constitute the office records for the premises at 1249 Polk Street in 1924. Government's Exhibit in evidence, Exhibit No. 4, is a bill for telephone service for 1249 Polk Street. I am familiar with the records of the company, and with all these forms. This is a bill for individual residence flat service desk telephone service and a statement attached covering the toll service, at 1249 Polk Street. These are official office records of the telephone company kept in the usual course of their business.

This is an application for telephone service in San Francisco, to be listed in the telephone directory, originally applied for as Marron, Eddie, residence 1249 Polk Street; class of service, individual flat desk; $3.50 per month; superseding Mrs. C. Hawkins. The change in name took effect November 1, 1923; no final bill to be rendered. Paid a service connection charge of $1.50 for the transfer of the name. Taken by salesman Louis Messau on 11-21-23. Signed Eddie Marron. Associated with that is what is known as the service order covering the transfer in name, which, when is issued, is sent through the various records to complete the change so far as directory and other records of the company are concerned. That is a duplicate of the original application which is held in the main office. Then we have a service order attached here for an [133] extension telephone at 50 cents a month, to be installed at 1249 Polk Street, taken on July 17, 1924, and installed on July 29,

(Testimony of Edward T. O'Donnell.)

1924, for which we billed a service connection charge of $1.50. Then we have a service order taken under date of 3–25–24 changing the directory listing from Eddie Marron to Charles Clark, billing to remain in the name of Eddie Marron; also a confirmation postal card relative to discontinuance of service, dated October 20, 1924, discontinuing the service to be effective on that date, October 20. That is a confirmation of the telephone conversation.

Government Exhibit 4 is not a final, revised bill. That is a bill for the month of October in advance and toll service up to and including the date there specified. I think the final bill was left in court. This document that I have now been shown is a closing statement of the account. The Eddie Marron account at 1249 Polk Street. This covers exchange service to 10–20–24, $2.58; toll service from 9–21 to 10–16–24, and from 8–21 to 9–20–24; $2.42 and $8.19, making a total of $13.19.

TESTIMONY OF L. B. BYBEE, FOR THE GOVERNMENT.

L. B. BYBEE, a witness called for the United States, and sworn, testified as follows:

Direct Examination.

(By Mr. BONSALL.)

I was formerly a federal prohibition agent.

A. Yes, sir. I visited the premises 1249 Polk Street in the City and County of San Francisco, State of California. I cannot give the exact date.

(Testimony of L. B. Bybee.)

It was the latter part of 1924. I think about September. I purchased drinks there about that time. I think they were Scotch whiskey highballs. I had a description of the man I purchased them from.

EXCEPTION No. 32.

Q. What is the best of your recollection as to who you purchased [134] from?

Mr. SMITH.—We object to that on the ground it is immaterial, irrelevant and incompetent. If he has a recollection it is a different story.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

A. To the best of my recollection it was Mr. Eddie Marron.

EXCEPTION No. 33.

Mr. BONSALL.—Q. This defendant?

Mr. SMITH.—We interpose an objection to the last question on the ground that it is leading and suggestive.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

A. Yes.

Mr. BONSALL.—Q. Did you pay for this liquor?

A. I did.

Cross-examination.

(By Mr. SMITH.)

I have not my notes on the date that I visited the place in 1924, but to the best of my recollection, I think it was along about September. I am not positive as to the exact date now. My notes are

(Testimony of L. B. Bybee.)

not available. If I previously testified that I visited the place in November, 1924, that is the date. I think I bought six drinks on that occasion —three rounds. A friend was with me at the time whose full name I do not know. I have seen that party since the time of the purchase. I cannot recall as to the last time that I saw him. I cannot without help on that. I have seen that party since then.

Q. You said it was a friend of yours that went there with you.

A. Well, yes, an acquaintance at any rate.

The WITNESS. — (Continuing.) [135] Q. An acquaintance, and you don't know his name?

A. His name?

Q. Yes.

A. The transcript on that is correct; it is a lady.

The WITNESS.—(Continuing.) I have been over this record some time since the first hearing on that. I don't know approximately when—two or three weeks ago, I guess, or something like that. I have been over the record very recently,—within the past month I should say. That is the only time that I visited the place at 1249 Polk Street. No, I will take that back; there was once after that, in making certain investigations I visited the premises on matters connected with this case, but it was locked up. It was after the date on which I made the purchase at that place. It was not closed up at the time I visited the place. It was closed up very shortly after that, after the raid. They moved

(Testimony of L. B. Bybee.)

all the furniture out, and so on, and locked the place up after that. If the record discloses that my former testimony shows that I visited this place in November, 1924, that is what I testified before, but it is correct, because I had my notes which I made the following day after making the purchase, or, rather, that same night after making the purchase. I lived very near the place. In other words, I want this jury to understand that I purchased liquor in there from Eddie Marron during the month of November, 1924, if the record so discloses my testimony to be.

TESTIMONY OF WALTER BRAND, FOR THE GOVERNMENT.

WALTER BRAND, a witness called for the United States, and sworn, testified as follows:

Direct Examination.

(By Mr. BONSALL.)

I reside at 527 Saxon Avenue. I occupied the premises at 1249 Polk Street in the City and County of San Francisco, State of California. [136]

EXCEPTION No. 34.

Mr. SMITH.—Just a second, may it please the Court. We object to any testimony from the witness Mr. Brand concerning the premises at 1249 Polk Street for the reason that in the former trial of this case the verdict of the jury in effect decided that Mr. Brand was not a co-conspirator in any

(Testimony of Walter Brand.)

sense of the word with Mr. Marron by its verdict of acquittal of the witness Brand. We urge that his activities therein therefore, have been adjudicated finally, and that any testimony elicited from him concerning that place would be immaterial, irrelevant and incompetent.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

EXCEPTION No. 35.

Mr. BONSALL.—Q. When did you first take possession of the premises, Mr. Brand?

Mr. SMITH.—We object to that as immaterial, irrelevant and incompetent.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

A. On the 26th day of July, 1923.

EXCEPTION No. 35A.

Mr. BONSALL.—Q. From whom did you obtain those premises?

Mr. SMITH.—The same objection.

Mr. WISEMAN.—And on the further ground that it is hearsay so far as the defendant Marron is concerned.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

A. From George Hawkins.

EXCEPTION No. 36.

Mr. BONSALL.—Q. How did you come to buy the place from him?

Mr. WISEMAN.—May the same objections run

(Testimony of Walter Brand.)

to the questions propounded to this witness, your Honor? [137]

The COURT.—Yes. Objection overruled.

Mr. SMITH.—And on the further ground that the record does not at this time show any relation whatsoever between the witness Brand and the defendant Marron, there is no *prima facie case* of conspiracy.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

A. I heard it was for sale, and I asked him how much he wanted for it and I bought it.

Hawkins wanted $1,500 for the place at first. Then he agreed to take $1,000. I know the defendant, Eddie Marron. I have known him about 6 or 7 years. Longer than that probably.

EXCEPTION No. 37.

Q. At the time you bought this place, did you borrow any money from him? A. Yes.

Mr. SMITH.—Just a moment. That is objected to as leading and suggestive.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

The WITNESS.—(Continuing.) I borrowed different amounts at different times from him. First I borrowed $325, and I could buy this place for a thousand dollars and I went and asked him to lend me $1,000. I didn't tell him what I was going to do with the money. I didn't tell him that I was going to buy a place with it. I didn't tell him that

(Testimony of Walter Brand.)

I was going to buy Hawkins out. He never knew Hawkins. I never mentioned Hawkins' name to him.

EXCEPTION No. 38.

Q. How long did you continue to run that place?

Mr. SMITH.—That is objected to as immaterial, irrelevant and incompetent. What the witness Brand did at 1249 Polk Street is not in any way binding on the defendant Marron.

The COURT.—It may not be. I presume the district attorney [138] will connect up the testimony.

Mr. BONSALL.—I promise to connect it up, your Honor.

The COURT.—Very well. Objection overruled.

Mr. SMITH.—Exception.

Mr. WISEMAN.—May it be subject to a motion to strike?

The COURT.—Yes.

Mr. BONSALL.—If I don't connect it up I will move to strike it on my own motion.

Mr. SMITH.—At that time all the damage will be done.

The COURT.—We will hope that the District Attorney won't offer it unless he proposes to connect it up.

Mr. BONSALL.—Q. How long did you continue to run that place at 1249 Polk Street?

A. It must have been three or four months, probably?

(Testimony of Walter Brand.)

Q. To what month, and in what year, did you continue to run it? A. I don't remember.

Q. Can you fix the date to the best of your recollection?

The COURT.—Have you anything before you with which to refresh his recollection?

Mr. BONSALL.—I have, your Honor.

The COURT.—Then ask him the question direct, if it was on a certain date.

Mr. BONSALL.—Q. Didn't you occupy this place until about September, 1923? A. Yes, sir.

EXCEPTION No. 39.

Q. Just before you parted with the possession of this place, did you have a conversation with the defendant Eddie Marron about one George Birdsall?

Mr. SMITH.—That is objected to as immaterial, irrelevant and incompetent, not binding upon the defendant Marron, unless it is shown that the conversation in some way related to the subjectmatter [139] of the charge now being tried.

Mr. BONSALL.—We will show that.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

A. No, I did not.

The WITNESS.—(Continuing.) I told Eddie Marron that I wanted to get out of the place. Two days afterwards he had George Birdsall out there. I believe the next day afterwards he said that George Birdsall was going to come in there. I told him I wanted to get out of there. I didn't care who came in there.

(Testimony of Walter Brand.)

EXCEPTION No. 40.

Q. Did he tell you how much salary Birdsall was going to get?

Mr. SMITH.—We object to that as immaterial, irrelevant and incompetent.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

A. No, he never did. I told him I was not paying Birdsall, I wanted to get my money out of the bank.

The WITNESS.—I had some money in the bank from 1249 Polk Street. It was the Bank of Italy. The account was in my name and Eddie Marron's. We both had to sign checks.

EXCEPTION No. 41.

Q. Who suggested that the account be fixed in both names?

Mr. SMITH.—We object to that on the ground that it is assuming something that is not in evidence.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

The WITNESS.—(Continuing.) After I got the money about 4 or 5 days after I borrowed the money, he came up there with a friend of his and I believe bought a drink. He said, "Oh, this is what you are doing." I told him "Yes." He bought a drink. He said, "You [140] are selling booze." I said, "Yes." He said, "What do you do with this money?" I said, "I am keeping it." He said, "What about my thousand dollars?" I

(Testimony of Walter Brand.)

owed him $1,325. He said "You had better put that in the bank for my protection, you might get knocked over and I would lose my money, put the money in the bank." So I thought it was all right to put it in the bank, and let him know what I was doing with the money. So I put it in the bank. The money I took in. That was when I first started in. Then after that he would come up maybe once a week or once every two weeks. I had people in there drinking sometimes and there were rooms there, too. There were times when he came up there that he saw people drinking in there. He had to sign checks.

Q. Did you ever have a final settlement of that bank account in the Bank of Italy with Eddie Marron?

A. He had to sign the checks. I wanted my money out of there, and he had to sign the checks, both of us had to sign the checks. I could not get hold of Marron sometimes for three or four days,—

Q. You have not answered my question, Mr. Brand?

Mr. WISEMAN.—I submit that it is an answer to the question.

The COURT.—No, it is not.

Mr. BONSALL.—Q. Did you ever have a settlement with Marron on that bank account?

A. He had to sign the checks to release my money.

The WITNESS.—(Continuing.) I don't remember exactly the time of the settlement. It was in 1923. It was in the fall of 1923, I guess. Birdsall was there long before we had the settlement. I

(Testimony of Walter Brand.)

didn't step out after the settlement. I stayed around there to get the settlement; I could not find the man, he was not around the place. But I finally got the settlement and I did not stay around after that. I think I did for three or four days. I had a little money loaned out and I stayed [141] around trying to get it. After I stayed around trying to get the money I didn't have any interest directly or indirectly in the premises at 1249 Polk Street. I gave up my interest at that time. I drew out the money in the bank at the time of the final settlement of the bank account in the names Brand and Marron at the Polk Street branch of the Bank of Italy. It was a small amount. I don't remember exactly. I received, I think, something in the 80s. I could not tell it was for Marron. It was in an envelope by the cash register, left there for me. I found it in an envelope near the cash register with the money I asked for. I asked George Birdsall and I believe Eddie Marron was there and two or three other people. I said, "I want to move my ice-box and chairs out." Somebody said, "What do you want for them?" I don't know exactly who said it. I said, "Oh, give me $85," or something like that. It was getting late, and I went home, and when I came back the next day there was $82 or $84 there on the register for me in an envelope. I recall looking over this testimony previous to this trial. There is no question about the testimony I gave at the last trial; I could not tell you what became of the furniture in the place. I left the

(Testimony of Walter Brand.)

furniture and everything in there. I objected to Mr. Marron paying Birdsall a $20.00 salary. I had the money in the bank and I wanted back my money from the bank. I told him he could not give him $20 a day. I told Eddie Marron, this defendant.

Mr. BONSALL.—Q. Mr. Brand, without any comment, I show you this book—

A. Your Honor, I would like to make a statement, first.

The COURT.—Q. What is the statement?

A. I would like to have the jury know that I was arrested for conspiracy a year and a half after I left the Polk Street place. I had nothing to do with Eddie Marron. Eddie Marron never received one five-cent piece of my sales or my profits. What Eddie Marron [142] did afterwards I don't know, and if I did know, or anybody else, I am not a stool-pigeon or a snitch. I would rather go to jail myself.

Q. You are not on trial now. You understand that?

A. I understand, your Honor. I was dismissed on this charge of conspiracy a year and a half after I was at the Polk Street place. I was dismissed by the jury. They are reading my testimony here. They are repeating everything over and over again to me. This morning it came out in the papers that I was Eddie Marron's partner. The newspaper reporters think I am getting tried with Eddie Marron. One paper said I was his partner; an-

(Testimony of Walter Brand.)

other paper said I was his pal. He is no partner of mine.

Q. It might be unfortunate that you are placed in this position, but that is not the fault of the Court, it is not the fault of the District Attorney. It is not the fault of the members of the jury who are sitting here trying the case. What is your reason for making this statement?

A. The reason is that this is my home, I live here. It is two years afterwards that I am brought into this court again. My testimony cleared me of conspiracy. It was not Eddie Marron's testimony. I have nothing to do with Eddie Marron. I don't know nothing else. Just read my testimony to the jury.

Q. All you are called upon to do is to testify to the truth.

A. I am testifying to the truth.

Q. All right. Tell the truth upon the witness-stand. Let the jury be the judge.

A. I know, but it came out in the papers that I was Eddie Marron's partner and was going against him.

Q. The newspapers are not trying you.

A. I know, but this is my home, and I have a family and a lot of friends here. When they read the newspapers that way they think I am turning snitch. I would rather go to jail myself than to put anybody in bad in any shape or form. I don't know the man, only that I borrowed some money from [143] him. I paid it back to him.

(Testimony of Walter Brand.)

The COURT.—Now that you have delivered yourself in this manner, just answer the questions that are asked you by counsel.

A. Yes, I will do that.

EXCEPTION No. 42.

Mr. BONSALL.—Q. Have you ever seen this book before, Mr. Brand? A. Yes, I have.

Mr. SMITH.—We object to any testimony concerning this book upon all the grounds heretofore urged. May that objection be considered as having been made again at this time?

The COURT.—Very well. Objection overruled.

Mr. SMITH.—Exception.

Mr. BONSALL.—Q. Where did you see that book, Mr. Brand? A. 1249 Polk Street.

Q. Are there any entries in there in your handwriting? A. Yes.

Mr. SMITH.—Just a second. That is objected to as immaterial, irrelevant and incompetent, and if so, then those entries are not in any way binding on the defendant, Marron.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

Mr. BONSALL.—Q. Now, will you be kind enough to show to what page your entries extend? Just take a minute and look through it.

EXCEPTION No. 43.

Mr. SMITH.—May the same objection run to all this testimony, and upon the further ground that there has been no *prima facie* case of conspiracy

(Testimony of Walter Brand.)

shown to have existed between the defendant Marron, and the witness, Brand; and upon the further ground that at a former trial of this matter, by a verdict of the jury the witness, Brand, was declared not to have been a co-conspirator, and that is an adjudication of the fact.

Mr. BONSALL.—If the Court please, any testimony that this man [144] might give as to any transaction with Marron would be admissible, notwithstanding that they were not co-conspirators.

The COURT.—It is admissible as proving a conspiracy between Marron and other parties. Objection overruled.

Mr. SMITH.—Provided there is a *prima facie* showing of a case of conspiracy.

The COURT.—The District Attorney cannot prove his case all at one and the same time; it takes some time to get a case all in before the jury. When it is all in then is the time to determine whether or not a conspiracy has been made out.

Mr. SMITH.—The motion is overruled, your Honor?

The COURT.—Yes, overruled.

Mr. SMITH.—Note an exception.

A. Page 37 is all that I can see. And I didn't write everything up to page 37; some I didn't use there.

Mr. BONSALL.—Q. Well, we will take it up page by page. I show you these items of receipts on page 2. We will skip the index. I show you

(Testimony of Walter Brand.)

these items of receipts on page 2; are any of those in your handwriting?

Mr. SMITH.—That is objected to as immaterial, irrelevant and incompetent; if there is anything in his handwriting it would not be binding upon the defendant, Marron.

The COURT.—Objection overruled. Why repeat these objections, counsel? I thought you had put in an objection to all of the evidence of this witness relating to Government's Exhibit No. 1.

Mr. SMITH.—If we can have an omnibus objection that will cover all the testimony, your Honor, very well.

The COURT.—I don't know that you can have an omnibus objection by simply asking the Court to rule that way upon it. I thought you had already put in an objection covering that [145]

Mr. SMITH.—I objected to the particular question asked. At this time I will make an objection to all testimony sought to be elicited from this witness concerning entries in Government's Exhibit 1 upon all of the grounds heretofore urged.

The COURT.—Very well.

Mr. SMITH.—We note an exception.

Mr. BONSALL.—Q. Which of those figures are in your handwriting? A. Right here.

Q. Not these ink figures? A. No.

The WITNESS.—(Continuing.) The entries in lead pencil are in my handwriting. The ink entries are not. I was in charge on August 12, 1923. These entries were made at my direction in ink.

(Testimony of Walter Brand.)

Frank Darrow made them. I know his handwriting. He is an accountant. He was employed by me. I had him make up the books for me. The items on page 7 are in his handwriting; put there by my direction; also that is his on page 15, put there under my direction. Those figures on page 20 and 21 are in my handwriting, with the exception of those up there. They were put in by Darrow under my direction and on 22 and 23 were written by me; 24 and 25 were written by Darrow under my direction; 26, 27, 28 and 29 were written by me. The entry on page 31 is Darrow's writing. W. Brand, $480.99; E. Marron, $603.08. $1012.05, were put there by my direction.

The entries on pages 32 and 33, which says: "Gross receipts and deposits in bank," do not refer to my time; they are not mine. That has nothing to do with me; don't know nothing about them. In the last trial I testified about making certain deposits in the Polk Street branch of the Bank of Italy. Those are not shown in this book. I had a bank book and I put the money in the bank each day. I do not remember the date when I made the last deposit in the Polk Street branch of the Bank of Italy; what month or what [146] year it was. I didn't make a deposit in 1924, in that account. I didn't make any around Thanksgiving of 1923. I don't remember if I made any in October, 1923. I am positive I didn't make any for November, 1923. I didn't have any connection with those premises at all after the bank account was

(Testimony of Walter Brand.)

closed. I never had any connection before the bank account was closed with the premises 1249 Polk Street. I was up there. I was not running it; George Birdsall was looking after the place. I have already testified in this trial that I was proprietor of the place. I was, if you want to call it that way.

The COURT.—Q. Do you mean to say you were the proprietor, but that you were not running it.

A. I never had the settlement from the bank, yet. That is what I mean. I was conducting the place there in the beginning. I opened the place. At the time I received $80 or thereabouts for some of the fixtures in the place, I threw the gray ledger in the closet right off the hall. There was a trap in that closet. After I got that money I never made any other entries in the book. I never instructed anybody to make any entries. The date of the last entry was October 1, 1923.

Q. I call your attention to page 286 of this transcript, the testimony at the last trial, the time you were a defendant in this action, and I ask you to read that over and tell me if it is correct.

Mr. SMITH.—Q. What portion are you directing the witness' attention to, Mr. Bonsall?

Mr. BONSALL.—The middle of the page.

A. Yes.

Q. Will you read it to the Court, commencing right here: "When was it that the defendant, Marron, came to you with the proposition to take over the business himself?" And your answer com-

(Testimony of Walter Brand.)

mencing here: "He came around there and told me that I was working alone, and he saw the business I was doing"—

Mr. SMITH.—Now, just a second. We object to this witness [147] reading the testimony he has heretofore given.

The COURT.—Take it and read it and let us pass along.

Mr. SMITH.—I think the proper way to proceed is to let the witness testify according to his memory. This is not the proper way to refresh the witness' memory.

The COURT.—This will save time. He said he gave that testimony.

Q. You gave that testimony, Mr. Brand?

A. Yes, sir.

Mr. BONSALL.—I will read it:

> "A. He came around there and told me that I was working alone, and he saw the business I was doing, and he said he thought he would put Birdsall up there, and asked me if I knew the man, and I said no. Then that night he said, 'I think I will put him up here and take the place,' and that afternoon he brings up a register, and I said, 'You can take the place.' So I asked him to give me the money that was in the bank, and he said he would as soon as he saw Farrell, the man that used to make up my books for me."

The WITNESS.—(Continuing.) It was pretty hard to get Marron and Mr. Darrow together; one

(Testimony of Walter Brand.)

would be there but the other would not be there. I had some difficulty in getting a settlement, in getting all the parties together at one time. It went along for a couple of weeks before I finally got my settlement, and after that settlement I had nothing to do with the place. That is correct. It might be a little over $100, probably $125.00, or something like that, I got out of that final settlement with Marron. I don't think there was much money in the bank. I just asked Marron for a loan of $1,000. He never asked me what I was going to do with it. He was surprised to find out that I had a bootlegging place. He never asked me what I was going to do with it. He didn't ask me when I was going to pay it back, because I borrowed money from him before. On several occasions I borowed $200 or $300 from him and he gave it to me without [148] asking any questions. He didn't ask me when I was going to return the money to him when I borrowed it from him. No time was fixed. He just gave me the money when I asked him for it. He paid the $1,000 all at once. He gave me $1,000. He gave me $500 one time and $500 another time. I bought stock with it. He gave me the second $500 about half an hour after he gave me the first. He loaned money to me several times subsequent to that time. I never got any money after he gave me the $1,000. He loaned me $500 first and a half hour later he loaned me $500. He went to the bank to get the rest of it. He didn't have it with him. I didn't tell him what

(Testimony of Walter Brand.)

I wanted the money for. He never asked me and I never told him. I told him I would like to borrow $1,000 from him. He said you can see me tomorrow. I am a little busy now. I will see you tomorrow. He never asked what I wanted the $1,000 for and I never told him. He didn't ask me for any security. Nothing, whatsoever. He didn't ask me for a note. I never gave a note. No writing of any kind. Not a bit. Merely upon my request for $1,000, he said, "All right, I will let you have it." There was no conversation between us as to what the money was to be used for.

I have known Mr. Marron 7 or 8 years; longer than that probably. I was very friendly with him. I was not very friendly with him. I met him occasionally. I would see him before I borrowed the money. I was not particularly friendly. He was a good friend of mine. I had never been in business with him before. He was a social acquaintance. Before I went up there I had another bootlegging place, and he used to come and visit me and buy a drink and walk out. That was before I got the Polk Street place. That was not where I met him. I met him away before that. I met him before prohibition. I have been in the saloon business all my life. I had a place of my own.

Mr. BONSALL.—Q. Did Eddie Marron loan you $500 about August [149] 1, 1923? I call your attention to this testimony here at the last trial, your cross-examination by Mr. Smith, page 298 of the transcript. I ask you to read down from this

(Testimony of Walter Brand.)

question asked by the Court; read through these two pages to save time and tell me if that is correct.

Q. The only reason I ask you to read that is, Mr. Brand, that, according to that testimony, it seems there was some time between the time you got the first $500 and the second $500.

Mr. SMITH.—If that is the purpose of the testimony we object to the question on the ground that counsel for the Government cannot impeach his own witness.

The COURT.—No, but he can refresh his memory.

Q. You say you got $500 the first time.

A. Yes, sir.

Q. And you said that half an hour later you got another $500. A. Yes, sir.

Q. Is that so?

A. I got $500 to get stock; then afterwards, about this time, about four or five days afterwards, I did get $500 from Eddie Marron.

Mr. BONSALL.—Q. From this defendant, Eddie Marron? A. Yes, sir.

Q. You got $1,500 from him altogether?

A. I got $500 for the stock, but I gave him that $500 back again.

Q. I thought you had forgotten that.

A. I did forget it.

Q. Between the time you got the first $1,000 from Mr. Marron and the second $500 that you got—

Mr. SMITH.—Just a minute. I think counsel is misstating the evidence—not intentionally, but I

(Testimony of Walter Brand.)

think counsel, himself, is confused. The witness has not testified that he got $1,000 from Mr. Marron the first time.

The COURT.—Well, let the witness tell it.

The WITNESS.—(Continuing.) I got $500 and I gave it to Hawkins [150] as the deposit. I told him I would give him $500 in 30 days. He was satisfied. I got $500, and I bought some stock. You cannot get very much stock for $500, so I ran short on stock and I got $500 from Marron. In the meanwhile I paid Marron back $500, about the first of the month, or something like that. I got $500 again, and I bought $500 more of stock I borrowed it and paid it right back. I got $500 at one time. I got about $1,500 from him. I got $325 before I borrowed that.

Mr. BONSALL.—Q. Between the time when you got the first loan of $1,000 and the second loan of $500, taking it that the two $500's on the first loan were given you within one hour, and we will call that one loan, did Mr. Marron come into your place? A. He came up to give me the money.

Q. How many times did he come into your place before he let you have the second $500?

A. Before that he came up once a week.

Q. I didn't ask you that. I said between the time when you got the first and the second loans, how many times did he come in there?

A. After I took possesion of the place?

Q. No, I didn't ask you that. I say between the

(Testimony of Walter Brand.)

time you got the first and the second loans? How long a time was that, incidentally?

The COURT.—About how long?

A. About an hour or half an hour. He went down to the bank to get the rest of the money.

Q. You got $1,000, did you not? A. Yes, sir.

Q. Between the time of getting that $1,000 and the next $500, how much time elapsed?

A. About six days, probably.

Mr. BONSALL.—Q. And during that time did Mr. Marron come in to see you?

A. No, he did not.

Q. I call your attention—

A. Yes, he did, he came up there about two days afterwards, I believe.

Q. How many times did he come up there during that time? A. Once.

Q. Only once?

A. I think it was once he came up there. He never [151] stayed around the place.

The COURT.—Q. Did I understand you to tell the jury that he brought the $500 to you there at the Polk Street place? A. Yes.

The WITNESS.—(Continuing.)

Mr. BONSALL.—Q. Did he buy anything from you while he was up there?

The COURT.—Did he buy a drink?

A. He came up with a gentleman before that, and the gentleman bought a drink. That is the way he found out I was bootlegging. He did not like it very well, and he made me put his money in the

(Testimony of Walter Brand.)

bank He said to me, "If you get knocked over where is my money coming from?" So, after that I put it in the bank to protect the man's money. Of course, any time I might get arrested by the Federal authorities. I protected his money and put it in the bank, the money that was coming to him.

The COURT.—Q. Was that before he let you have the $500?

A. Yes, sir.

Q. After that he let you have $500?

A. Before that, and then after he let me have $500. I paid him $500 and then he let me have $500 to buy some stock.

Q. When he came up there he said, "So this is what you are doing," and he wanted you to put his money in the bank so his loan to you would be protected? A. Yes, sir.

Q. And thereafter he loanded you $500 more, did he? A. Yes, sir.

Q. He came up to the place on Polk Street and brought it up there himself, didn't he?

A. Yes, sir.

The WITNESS.—(Continuing.) Mr. Marron bought drinks. He bought one drink. That was before he loaned me the $500. I cannot remember whether he made more than one trip during those two days between the first and the second loan. He might have. I remember him talking to me about a bank account. That was not the time he bought the drink. I think it was the next day. I believe

(Testimony of Walter Brand.)

so; I don't [152] remember. That was after he left me have the second $500.00.

Q. It was after he gave you the second $500. Then he suggested your having the joint bank account, did he?

The COURT.—No, that was before. He suggested the bank account after he let him have the $1,000.

Q. Is that correct? A. Yes, sir.

The COURT.—And thereafter he came and brought him $500.

Mr. BONSALL.—I see, your Honor.

Q. I call you attention to your testimony at page 299 at the last trial, in January, 1925, and ask you to read that through to refresh your recollection, reading through page 300.

A. Where do you want me to start, the whole of page 299?

Q. No, start here at this question, "You just turned everything over to Marron, stock and everything?" And read from there down.

A. Yes, I guess that is right.

Q. Is that a correct statement, Mr. Brand?

A. Yes, sir.

Q. It was true at the time you testified to it, and it is true now? A. Yes, sir.

Mr. BONSALL.—I will read this.

The WITNESS.—I was arrested for conspiracy with Marron when I made that statement before the Court.

(Testimony of Walter Brand.)

Mr. BONSALL.—We understand you were on trial. You were a defendant, and you were on the witness-stand.

The COURT.—Q. What do you mean by that, that you were testifying then to something wrong?

A. No, sir, I was not. I was arrested jointly with Eddie Marron for a conspiracy a year and a half afterwards. I made this statement there when I took the witness-stand.

Q. Is it true?

A. Absolutely; read it to the gentlemen of the jury.

Mr. BONSALL.—I wil read it. [153]

Q. You just turned everything over to Marron, stock and everything?

A. Everything. The man I was buying stock of, he never came around, I never called him up after that, and I never bought any stock from the time that Birdsall came in there. I quit buying stock.

"Q. Was there any more stock put in?

"A. There must have been, to run it.

"Q. Do you know whether there was, or not?

"A. I could not tell you, I never had anything to do with it. I would go up once a day to try to have a settlement.

"Q. You could not get a settlement?

"A. I could not get them both together, one day he would be there and one day he would not be there, until about 15 or 16 days afterward.

"Q. How much did you get for your tables and chairs? A. I think something like $82 or $84.

(Testimony of Walter Brand.)

"Q. Did that include all of the furniture in that place?

"A. That included everything, that was my stuff, that I bought in the place.

"Q. There was some stuff in there when you went there? A. Yes.

"Q. You threw that all in, too? A. Yes.

"Q. You got about $84 for the whole business?

"A. Yes, the extra table that I bought.

"Q. Did that include the liquor you had on hand when Marron took it over?

"A. There was not much liquor up there—that included everything.

"Q. There was a stove in the kitchen, was there not? A. Yes.

"Q. When you had your division with Marron finally, what was that division?

"A. We went to the bank and took the money out of the bank.

"Q. And did he give you all of the money in the bank? [154]

"A. I got it all.

"Q. There was $104.26, the last check that was drawn on November 14th; did you keep all of that $104? A. Yes.

"Q. He gave you in addition to that $84?

"A. Yes."

The WITNESS.—(Continuing.) After November I had absolutely no connection with that place. After this final settlement, whatever date it took place, I never had anything more to do with it. I

(Testimony of Walter Brand.)

never had anything to do with it; I was taken sick and went to the hospital and was sick for three months.

Cross-examination.

(By Mr. SMITH.)

I didn't have anything to do with the premises at 1249 Polk Street after October 17, 1923. I believe it was after that date that Mr. Birdsall came into the place. At the time I spoke to Mr. Marron about this loan of $1,000, I didn't tell him what use I was going to put the $1000 to. He gave me the $1000. He gave me $500 and $500. All that I borrowed from Mr. Marron, aside from what I had already owed him prior to that time, was $1000. After I borrowed the $1000 I returned $500 to him. Nobody ever assisted me in the conduct of the business, while I was operating 1249 Polk Street. I have had nobody at all in my employ. I never divided the profits with anybody. With myself. I was independent. I never returned as an interested partner at 1249 Polk Street after I left that place in October, 1923. At the time that I testified I had a final settlement with Marron over moneys advanced to me. I paid him everything that I owed him.

Q. What was the condition of your health at the time you left the place at 1249 Polk Street?

Mr. BONSALL.—I don't see how that can be material, relevant or competent. I object to the question.

The COURT.—Objection sustained. [155]

(Testimony of Walter Brand.)

Mr. SMITH.—May it please the Court, the theory of the prosecution here is that the defendant Walter Brand conspired with the defendant Eddie Marron. By the question I proposed to show that the defendant Walter Brand was in such a state of health that he was compelled to and did go to the hospital and that he remained there for a considerable period of time after he left the place.

Mr. BONSALL.—I think we can help counsel, if that is what he wants to do. We do not contend that after October 17, 1923, the defendant Brand had anything to do with the place. Does that help you?

Mr. SMITH.—Yes.

The WITNESS.—(Continuing.) Prior to October 17, 1923, Mr. Marron was not interested in 1249 Polk Street as my partner or otherwise. Mr. Marron did not carry on any negotiations with me for the purchase of the place at 1249 Polk Street when I bought the place from Mr. Hawkins. All those transactions and conversations were carried on between me and Mr. Hawkins alone. Mr. Marron simply out of kindness, loaned me this money. He didn't loan it to me for the specific purpose of purchasing a bootlegging establishment; I didn't tell him that I was going to use it for that purpose. I didn't want him to know. I kept it from him.

Redirect Examination.

(By Mr. BONSALL.)

After I opened up the joint bank account, Mr. Marron came up there once in a while. I don't

(Testimony of Walter Brand.)

know exactly how many times a week. I don't remember how many times he would come up there. It is three years ago. I can't tell you the day and date.

Q. Suppose I call your attention to page 297: "Q. Now, after you opened the joint banking account, did Marron keep coming up to your place?" Maybe that will refresh your recollection. If it is correct, let me know and if it is [156] not correct, let me know. A. Yes, that is right.

Q. And it was correct at the time you gave that testimony, and it is correct now?

A. I read it down to here; do you want me to read any further?

Q. No, that is all I want, Mr. Brand. Thank you. I will read this:

"Q. Now, after you opened the joint banking account, did Marron keep coming up to your place?

"A. Once in a while he would come in.

"Q. By 'once' you mean what—two or three times a week?

"A. Probably about twice a week."

Q. And that continued up to when?

A. I don't know. He would come up and buy a drink. He would come up with different people. That continued.

Q. That continued right up to October 17, 1923: Is that correct?

A. He came up there all the time, yes.

Q. And people were in there at the time he was there? A. Yes, I guess, sometimes.

TESTIMONY OF L. H. COLEMAN, FOR THE GOVERNMENT.

L. H. COLEMAN, a witness called for the United States, and sworn, testified as follows:

Direct Examination.

(By Mr. BONSALL.)

I am an adjuster for the Spring Valley Water Company. I have the records of our office as to the charges made against 1249 Polk Street for water for the year 1924. This is the record that I have in my hand. From this record I can tell you who the water was charged to at 1249 Polk Street in 1924. It was charged to Eddie Marron. [157]

EXCEPTION No. 44.

Mr. BONSALL.—I will make a formal offer of that record in evidence, but ask that it be withdrawn so that the company might have its records, unless you have an objection to that, Mr. Smith.

Mr. SMITH.—We have an objection to its going in at all. I am in favor of the company keeping the record.

The COURT.—Read it into the record.

Mr. SMITH.—We object to the introduction of the testimony about to be elicited from the witness upon the ground that what the record shows is immaterial, irrelevant and incompetent, and no foundation laid for its introduction; there has been no *prima facie* showing of conspiracy, and that those records are not in any way binding on the defendant, Marron.

(Testimony of L. H. Coleman.)

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

WITNESS.—(Continuing.) The water was charged to Eddie Marron. We keep our records by the monthly rate. I can call out each item, if you want it. From October 24, 1923, to November 4, 1924.

TESTIMONY OF CLARENCE W. BELL, FOR THE GOVERNMENT.

CLARENCE W. BELL, a witness called for the United States, and sworn, testified as follows:

Direct Examination.

(By Mr. BONSALL.)

I am assistant vice-president, Bank of Italy. I *am present* at the head office. I was formerly attached to the Polk Street Branch; from some time in April, 1923, to about the middle of December, 1924. I was in charge there during that time. I have seen the sheet of paper before that I am now being shown. It is an official record of the Bank of Italy, kept in the usual course of business. [158]

EXCEPTION No. 45.

Q. What is that record?

Mr. SMITH.—I object to that on the ground that it is calling for the conclusion of the witness. The record speaks for itself.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

A. This is the ledger sheet of an account of Brand and Marron at the Polk-Van Ness Branch.

(Testimony of Clarence W. Bell.)

EXCEPTION No. 46.

Mr. BONSALL.—Q. Can you tell from that when that account was opened? A. Yes, sir.

Mr. SMITH.—Just a second. Before we have any more testimony from this witness, may it please the Court, I object to any testimony concerning the account between Brand and Marron on the ground that it is immaterial, irrelevant and incompetent, that it is not shown at any time in the proceedings so far to have been in any way connected with the subject matter now on trial here; upon the further ground that there has been no *prima facie* showing of conspiracy existing between the defendant Marron and the person named Brand.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

EXCEPTION No. 47.

Mr. BONSALL.—Q. When was it?

A. September 4, 1923.

Q. And from that can you tell when the account was closed out? A. I can.

Q. What is that date? A. November 14, 1923.

Q. Calling your attention—

Mr. SMITH.—Just a second. So that there will not be the necessity of repeating these objections, may my objection run to all these questions, if the Court please?

The COURT.—Yes. Objection overruled. [159]

Mr. SMITH.—And an exception noted.

The COURT.—Very well.

(Testimony of Clarence W. Bell.)

EXCEPTION No. 48.

Mr. BONSALL.—Q. Calling your attention to this stamp, "Two signatures required," what does that indicate to you?

A. That means that withdrawals had to be made by the signatures of both Mr. Brand and Mr. Marron.

Mr. BONSALL.—I offer this in evidence.

The COURT.—Admitted.

Mr. SMITH.—May the record show that prior to the order admitting it there was the same objection, and that the objection was overruled and an exception noted?

The COURT.—Very well.

(The document was marked U. S. Exhibit 16.)

(Thereupon the document was here introduced in evidence as United States Exhibit No. 16.)

Said exhibit was and is in the following words and figures, to wit:

(Here insert exhibit.)

TESTIMONY OF SIDNEY FRANKLIN, FOR THE GOVERNMENT.

SIDNEY FRANKLIN, a witness called for the United States, and sworn, testified as follows:

Direct Examination.

(By Mr. BONSALL.)

I was a Deputy Registrar for the City and County of San Francisco, on January 14, 1924. I have seen the paper before that I am now being shown.

(Testimony of Sidney Franklin.)

That is an affidavit of registration that I made out on that date. That is my signature down there.

EXCEPTION No. 49.

Q. Is that your signature down there.

A. Yes, sir.

Q. Did you see it signed? Do you know whose signature that is? [160]

Mr. SMITH.—Now, just a second. We object to all of this examination, your Honor.

Mr. BONSALL.—This is for the purpose of getting an exemplar of handwriting.

Mr. SMITH.—Upon the ground that it is immaterial, irrelevant and incompetent.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

A. It is the signature of the man that answered the questions.

The WITNESS.—(Continuing.) I took the affidavit. The affidavit is that of Joseph Edmond Marron.

Mr. BONSALL.—Does the defendant, Joseph E. Marron, vote—I will withdraw that question. If the Court please, I offer this in evidence for the purpose of using it as an exemplar.

Mr. SMITH.—We object to it as immaterial, irrelevant and incompetent, and it could not possibly have anything to do with the issues now involved in this matter.

Mr. BONSALL.—There are three ways of proving handwriting, your Honor.

The COURT.—Yes, we know that. Are you of-

(Testimony of Sidney Franklin.)

fering it now in evidence, or offering it for identification?

Mr. BONSALL.—I was going to offer it in evidence.

Mr. SMITH.—We object to it as immaterial, irrelevant and incompetent.

The COURT.—There is no evidence here that that is the affidavit of registration of the defendant, Marron.

Q. Do you know the defendant, Marron, here in court? A. No, sir, I do not.

Q. Did you ever see him before?

A. I may have seen him.

Mr. BONSALL.—Q. Did you testify in the last trial? A. Yes, sir. [161]

Q. Did you testify at that time that this was the signature of the defendant, Joseph E. Marron?

A. No, sir.

Mr. WISEMAN.—He was not asked that question at the last trial.

The COURT.—I suppose, Gentlemen, it may be said that that is an official record, isn't it?

Q. Isn't that an official record?

A. It certainly is, yes, sir.

Mr. BONSALL.—Q. Can you recognize the man now that you took this affidavit from?

A. No, sir. I took probably 5,000 affidavits in the first part of that year. I would not recognize anybody.

Q. Did this man give his address as 2031 Steiner Street, San Francisco, California? A. Yes, sir.

(Testimony of Sidney Franklin.)

Mr. SMITH.—Now, just a second. We submit that the record, itself, is the best evidence of that fact.

The COURT.—That is so. Objection overruled.

Mr. BONSALL.—Q. Did you fill this form in yourself?

A. Yes, sir.

Mr. SMITH.—Just a second. We submit that the affidavit is the best evidence of what it contains.

The COURT.—He simply asked him if he filled it in himself. There can be no objection to that.

EXCEPTION No. 50.

Mr. BONSALL.—Q. At whose direction did you fill it in? A. The man who signed it.

Q. The man who signed it and who gave his address as 2031 Steiner Street? A. Yes, sir.

Mr. SMITH.—Now, just a second. That is objected to, if the Court please, as immaterial, irrelevant and incompetent.

The COURT.—Objection overruled.

Mr. SMITH.—Exception. [162]

EXCEPTION No. 51.

Mr. BONSALL.—Q. And what does this mean?

A. That means that he occupied the whole flat.

Q. And occupation dairyman, and born in California. This record shows here a ballot number, 15,353, voted: What does that indicate to you?

A. That he voted at the election.

Q. Whoever signed this signature voted at that election and the ballot number was 15,353: Is that correct? A. Yes, sir.

Mr. SMITH.—Just a second. We ask that the answer go out for the purpose of our objection.

The COURT.—Make your objection.

Mr. SMITH.—It is objected to as calling for the opinion and conclusion of the witness, and any testimony that he might give thereon is purely hearsay.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

EXCEPTION No. 52.

Mr. BONSALL.—I will ask that this be admitted in evidence on this theory, on the similarity of names.

The COURT.—You may admit it and hereafter connect it up.

Mr. SMITH.—We object to it on all the grounds heretofore urged.

The COURT.—Objection overruled. You can hereafter move to strike it out.

Mr. SMITH.—Exception.

(Thereupon the document was here introduced in evidence as United States Exhibit No. 17.)

Said exhibit is in words and figures, following, to wit:

(Here insert exhibit.)

TESTIMONY OF WALTER W. MENNE, FOR THE GOVERNMENT.

WALTER W. MENNE, a witness called for the United States, and [163] sworn, testified as follows:

Direct Examination.

(By Mr. BONSALL.)

I am a General Clerk, and on July 26, 1924, I was deputy registrar of voters. I have seen this paper that I am now being shown. That is my signature.

EXCEPTION No. 53.

Q. I show you the signature George L. Birdsall.

Mr. SMITH.—Now, just a second. We object to any testimony concerning any signature of George Birdsall on the ground that it is immaterial, irrelevant and incompetent.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

The WITNESS.—(Continuing.) I do not know the signature. I know that it was signed in my presence. It is an official record of the City and County of San Francisco.

EXCEPTION No. 54.

Q. I show you this ballot number, 3457, Voted: What does that indicate?

Mr. SMITH.—We object to that on the ground it is calling for the conclusion of the witness.

The COURT.—It indicates that he voted. Why waste time on that?

Mr. SMITH.—We submit that it is improper evidence.

(Testimony of Walter W. Menne.)

The COURT.—No, it is not. Objection overruled.

Mr. SMITH.—Exception.

The COURT.—Q. That mark indicates he voted: Is that right? A. Yes, sir.

Mr. BONSALL.—Q. And he gave his address as 519 Belvedere Street? A. Yes, sir. [164]

EXCEPTION No. 55.

Mr. BONSALL.—This is offered in evidence under the same condition.

Mr. SMITH.—Objected to as immaterial, irrelevant and incompetent, and hearsay, in so far as the defendant, Marron, is concerned, and it is not binding on him in any particular.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

(Thereupon the document was introduced in evidence as United States Exhibit No. 18.)

Said exhibits is in words and figures, following, to wit:

(Here insert exhibit.)

TESTIMONY OF CHARLES J. HAGERTY, FOR THE GOVERNMENT.

CHARLES J. HAGERTY, a witness called for the United States, and sworn, testified as follows:

Direct Examination.

(By Mr. BONSALL.)

My occupation is that of statistician in the office of the Secretary of State. I have been such for seven years. My duties there are in the Election

(Testimony of Charles J. Hagerty.)

Department. I have charge of the filing of the nominations, petitions, etc.

EXCEPTION No. 56.

Q. Have you with you the affidavit of Joseph Edmond Marron, made on July 12, 1916?

A. Yes.

Mr. SMITH.—I object to that as immaterial, irrelevant and incompetent, and any records made in the year 1916 were prior to the time that this conspiracy, or this alleged conspiracy, came into existence.

Mr. BONSALL.—It is merely for the purpose of getting exemplars of handwriting.

The COURT.—Objection overruled. [165]

Mr. SMITH.—Exception.

Mr. BONSALL.—Q. Have you that with you?

A. I think it is 1917, instead of 1916.

Q. Either one will do. A. This is it.

EXCEPTION No. 57.

Q. This is an official record filed in connection with the candidacy of Joseph Edmond Marron?

A. Yes, sir.

Q. Filed in the office of the Secretary of State?

A. Yes, sir.

Mr. SMITH.—We object to that on the ground it is immaterial, irrelevant and incompetent.

Mr. BONSALL.—We offer this in evidence, and, subject to your objection, I would like to permit a photostatic copy to be filed, so that this record may go back to the Secretary of State.

(Testimony of George W. Marsh.)

Mr. SMITH.—I have no objection to the substitution of a photostatic copy, but we do object to the introduction of the original into evidence.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

EXCEPTION No. 58.

Mr. BONSALL.—I offer this in evidence as our exhibit next in order.

(Thereupon the document was introduced in evidence as United States Exhibit No. 19.)

Said exhibits is in words and figures, following, to wit:

(Here insert exhibit.)

TESTIMONY OF GEORGE W. MARSH, FOR THE GOVERNMENT.

GEORGE W. MARSH, a witness called for the United States, and sworn, testified as follows:

Direct Examination.

I am a building inspector. I have been such for two years. I was familiar with the premises at 1249 Polk Street, in the City [166] and County of San Francisco, in the year 1923.

EXCEPTION No. 59.

Q. What time in 1923 did you go there, Mr. Marsh? A. The end of 1923.

The COURT.—Very well, go ahead.

Mr. SMITH.—Exception.

The WITNESS.—(Continuing.) I went there in 1923, I guess a couple of times a week. I don't

(Testimony of George W. Marsh.)

know exactly for how long, I don't know exactly whether it was in September or October, but it was something like that, I can't remember exactly, but I think it was during the last three or four months. And when I went there on those occasions, I went in to get a drink.

EXCEPTION No. 60.

Q. What kind of drinks did you get there?

Mr. WISEMAN.—Just a minute; we object to these questions on the ground that they are immaterial, irrelevant and incompetent—in September and October, 1923—the evidence of the witness, Brand, shows that that was before the defendant, Marron, was in there.

The COURT.—Objection overruled.

Mr. WISEMAN.—Exception. [167]

The WITNESS.—(Continuing.) I was there in 1924, too. I commenced to visit that place in the latter part of 1923. I visited it from then on. I went there in 1924 until about April, and then after that I guess I was in there maybe once a month or once in two months. I practically stopped going in there in about April, 1924. I was in there, I guess, a few times after that, but not many. I bought highballs, gin fizzes, beer. I could not say how many different times I purchased drinks there, but a number of times; fifteen or twenty times, I guess. They were there to sell it and they sold it to me and I paid money for it. I have seen the defendant, Eddie Marron before. I have seen him there at 1249 Polk Street, at times when I was pur-

(Testimony of George W. Marsh.)

chasing drinks there. I know Walter Brand. I bought drinks from him at 1249 Polk Street. I know Mahoney.

Q. Did you ever buy any drinks from him at that address? A. Yes, sir.

EXCEPTION No. 61.

Mr. SMITH.—Just a second. We object to the last question and ask that the answer go out for the purposes of our objection, on the ground that if he bought liquor from Mahoney it is not at all binding on the defendant Marron—or from Brand, either.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

EXCEPTION No. 62.

Mr. BONSALL.—Q. Do you know George Birdsall? A. Yes.

Q. Did you ever buy any drinks from him there?

Mr. SMITH.—The same objection, immaterial, irrelevant and incompetent, no *prima facie* showing of conspiracy between Birdsall and the defendant Marron.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

A. Yes, sir.

The WITNESS.—(Continuing.) When I saw Marron there, around [168] there, I don't know what he was doing. I seen him coming in and going out at different times. I would not say that he was in the same room. I met him maybe in the

(Testimony of George W. Marsh.)

hall. I would not say positively whether he was or was not. They had five or six *room* there, you know.

Cross-examination.

Mr. SMITH.—Mr. Marron never sold me any liquor. I never saw Mr. Marron sell anybody else any liquor while I was there.

TESTIMONY OF W. E. BIVENS, FOR THE GOVERNMENT.

W. E. BIVENS, a witness called for the United States, and sworn, testified as follows:

Direct Examination.

(By Mr. BONSALL.)

I live at 459 Turk Street. I have lived there seven years. During the latter part of 1923, and during 1924, and up to October 2d, I visited 1249 Polk Street, in the City and County of San Francisco, State of California. About those dates; it is so long ago, the first time; I recollect having gone there. I don't remember. It is a long time ago. Approximately over two years, ago.

EXCEPTION No. 63.

Mr. BONSALL.—Q. Did you ever make any purchases of liquor at 1249 Polk Street?

Mr. SMITH.—The same objection.

The COURT.—Objection overruled.

Mr. SMITH.—Your Honor, there is no time fixed.

The COURT.—The witness said within two years.

(Testimony of W. E. Bivens.)

Mr. BONSALL.—Q. Did you ever make any purchases of liquor there?

Mr. SMITH.—Objected to as immaterial, irrelevant and incompetent.

The COURT.—Objection overruled. [169]

Mr. SMITH.—Exception.

A. Yes, sir.

The WITNESS.—(Continuing.) In 1923 or 1924, I made purchases there. I know, but I don't remember the date. It was about 1923 or 1924, both, I guess. I think it was the latter part of 1924, and during the year 1924, I purchased drinks from Brand, Birdsall, Mahoney, the three defendants in the former trial. I asked for whiskey. It was supposed to have been whiskey that I got. I paid for it at all times. I went there and asked for whiskey and paid my money and got it. I know the defendant, Eddie Marron. I have seen him before in the premises 1249 Polk Street in the City and County of San Francisco, State of California. I think I have seen him in the room when I purchased the drinks. I have seen him a few times. I could not say exactly how many times.

Cross-examination.

Mr. SMITH.—The only persons I ever purchased from were Mr. Brand, and Mr. Mahoney, and Mr. Birdsall.

TESTIMONY OF RUDOLPH HERRING, FOR THE GOVERNMENT.

Direct Examination.

(By Mr. BONSALL.)

I live at 1233 Polk Street. I have lived there 16 years. Not at that place. That is my place of business. I had a place at 1233 Polk Street in November, 1923. I had occasion to visit 1249 Polk Street in November, 1923. At that time I saw George Birdsall and Walter Brand there; the two defendants in the former trial. I purchased intoxicating liquor at that place. I purchased whiskey there. I used to go there during the month of November, mostly every day—several times. Six or eight times a day or something like that. I purchased liquor from Mr. Brand and from Mr. Birdsall. I know the defendant, Eddie Marron. I have seen [170] him there during the month of November at 1249 Polk Street in this city. I have seen him there in that place, at that time. He was around the same room where I purchased liquor. It was whiskey that I purchased and paid for it. I had no trouble buying it.

Cross-examination.

Mr. SMITH.—Most of the liquor that I purchased was from Mr. Birdsall or Mr. Brand.

TESTIMONY OF W. K. LATHAM, FOR THE GOVERNMENT.

Direct Examination.

(By Mr. BONSALL.)

I testified at the last trial. I live at 1485 Pine Street. My occupation is the stationery and book business at 1515 Polk Street. I have been engaged in business at that location about 15 years. I know where the premises 1249 Polk Street are located. I had occasion to go to those premises between May, 1923, and October 17, 1924. I did go in the place. I went in there to get a drink. I got it. I got a drink of gin there. I paid for it. I generally got about two when I went in there. I should judge from the best of my recollection I was in there from around the 10th of May until the latter part of September not over five times. I purchased the drinks from a fellow by the name of Mahoney. I believe the defendant Mahoney in the former trial.

EXCEPTION No. 64.

Q. Did you know a man by the name of Joseph Gorham?

Mr. SMITH.—We object to that as immaterial, irrelevant and incompetent, and not binding on the defendant Marron whether or not he knew Gorham.

Mr. BONSALL.—He is a defendant.

The COURT.—What is the purpose of it?

Mr. BONSALL.—I want to show that Gorham was in 1249 Polk [171] street on one occasion.

(Testimony of W. K. Latham.)

The COURT.—He is not on trial here.

Mr. BONSALL.—He is not on trial, your Honor, but I want to establish the conspiracy.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

The WITNESS.—(Continuing.) I met the defendant, Gorham, there. A man who turned out later on to be Gorham came in on Sunday morning when I was in the place. I presume it is Police Sergeant Gorham.

EXCEPTION No. 65.

Q. A defendant in the last trial?

Mr. SMITH.—Just a second. We object to that as leading and suggestive.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

The COURT.—Q. He was a defendant in the case when it was tried before? A. Yes, sir.

The WITNESS.—(Continuing.) I went in there one Sunday morning and I was buying a drink in there and he came in. I didn't know that it was Gorham at the time. He came in there and stood around there and he looked at me in such an intensive manner that I really could not help but look at the fellow and look back at him. I little suspected then that he was a police officer. He was dressed in citizen's clothes. I poured out a drink and threw out the half dollar and I drank it and went downstairs. I was under the impression that I must have seen the boss of the place, from the manner in which he looked at me; it aroused my

(Testimony of W. K. Latham.)

suspicions and I looked back at him and got a good look at him. Of course, I did not know at the time that he was a police officer. On an occasion I saw a man in police officer's uniform in that place. One evening when I was going in there a man came down the stairs in uniform, but I could not say [172] who he was. It was dark in this hallway. He came downstairs as I went up. I was more or less under the impression that there must have been a raid on the place, and I hesitated about going up. Finally, I went up there. I could not say who the police officer was. I know the man was in uniform.

Cross-examination.

Mr. SMITH.—I could not say who the man was. He was in uniform. The time that Mr. Gorham was there was a Sunday morning. I am absolutely positive. He walked in there and walked around toward me and kept looking at me in a very close manner and he turned around and walked away. I saw him walk in there while I was buying a drink. He was dressed in a light suit of clothes, and with a light hat on. He walked up rather close to me and kept looking at me in such a manner that he naturally attracted my attention. I looked right back at him. I poured out a drink and threw down a half-dollar, took my drink and went downstairs. I went out of the place under the impression that he was the boss of the place. He was not doing anything while I was pouring out

(Testimony of W. K. Latham.)

a drink. He was standing there with his hands in his pockets. Closer than you are. His general description is: A stout, red-faced fellow, with a light suit of clothes and a light hat. Icould not say as to his age. I didn't pay particular attention to him, only that he looked at me in such a manner that he did attract my attenton; I could not say how old he was. I observed him pretty closely because he observed me so closely, and he observed me in such an intensive manner that I was on the point of telling him that I hoped he would know me the next time he saw me. I could not figure out why he should look at me in such a manner. He had a gray suit on. A gray hat, a light hat. I didn't see his shoes. I didn't look at his shoes. He did not have the appearance of an officer. He was dressed in citizen's clothes. I could not tell that he was an officer. I was not acquainted [173] with any officers there. He did not appear very meek. I could not say that he did. I never for a moment suspected that he was an officer. I have been in that district about 15 years. I never saw this man in that district prior to the time I saw him at 1249 Polk Street. I never saw him before he came in there. I could not give you the date that this Sunday fell on. It was the latter part of September. I cannot give you the exact date, because I was not keeping dates as to when I went in the place, or anything. That would be hard for me to do; I really could not do it. I discovered that it was Sunday that I went in there because I quit going

(Testimony of W. K. Latham.)

in there except on Sunday morning when there were not many people around, because I didn't want to be seen going in or coming out of the place. Still I went there. To the best of my recollection I testified at the last trial that it was on a Sunday morning. I cannot be mistaken in that. I know that positively.

Mr. SMITH.—May it please the Court, I am satisfied that the record shows to the contrary, and I *would a* little time in which to go over the record. May we take our recess at this time?

The COURT.—Very well, recess un*to* two o'clock.

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Mr. SMITH.—Q. Mr. Latham, I show you the transcript of your former testimony, and direct your attention first to the second question on page 417, and your answer thereto, and ask you if that is not the testimony you gave at the former trial?

A. That is what I said, yes.

Mr. SMITH.—With the permission of the Court, I will read this testimony:

"Q. Do you remember about when that was, approximately? A. Sir?

"Q. Do you remember approximately when that was?

"A. Well, I could not give the exact date; it was around the latter part of September.

"Q. What part of the flat did you go into?

"A. I went into the rear part.

"Q. The kitchen? A. Yes, sir."

(Testimony of W. K. Latham.)

Q. Now, I will show you the transcript of your former testimony on page 418 and direct your attention to that portion starting with "Mr. Gillis," on the fourth line, and ending at the cross marked here, ending with the word "Gorham," and ask you if that is the testimony you gave at the former trial? A. That is it.

"Mr. GILLIS.—Q. What other defendants did you see there at that time?

"A. While I was in there that gentleman sitting on the other side of Mr. Kissane came in.

"Q. That is, the side nearer the door?

"A. Yes, sir.

"Mr. GILLIS.—The record may show that that is the defendant Gorham."

Q. Now, I will direct your attention to the transcript on page 418, the middle of the page, starting with "Mr. Gillis," and ask you to read the balance of that page. Was that your testimony?

A. That was my testimony. [175]

Mr. SMITH.—With the permission of the Court I will read it:

"Mr. GILLIS.—Q. Did you see any liquor there? A. I did.

"Q. Was there any poured out?

"A. I poured out some myself.

"Q. What was it? A. Gin.

"Q. Poured out of a regular bottle?

"A. Yes, sir.

(Testimony of W. K. Latham.)

"Q. What was the defendant Mahoney doing?

"A. He just came in and walked around, he didn't do anything that I could definitely state.

"Q. Did Gorham have any conversation with him?

"A. Well, they did, but I didn't pay any attention to what they said.

"Q. You don't remember what they said?

"A. I don't. I was disinterested in what was going on, I was in there for the purpose of getting a drink, and I went out."

Q. Now, I will direct your attention to the cross-examination conducted by Mr. Kelly, on page 420, and ask you if that is the testimony you gave on cross-examination at the last trial, down to the words "Mr. Kelly: That is all." Was that your testimony? A. Yes, sir.

Mr. SMITH.—With the permission of the Court, I will read it:

"Mr. KELLY.—Q. What date was this in September?

"A. The latter part, I could not give the exact date.

"Q. Couldn't you approximate the date?

"A. I couldn't.

"Q. Was that the best way you can put it down, the latter part of September?

"A. It was. That is the best I could give you. I couldn't give you the exact time, be-

(Testimony of W. K. Latham.)

cause I didn't pay any attention to the date.

"Q. What time of day was it, or night?

"A. It was in the forenoon.

"Q. What time in the forenoon?

"A. I should judge around [176] eleven o'clock, maybe half-past eleven.

"Q. You can't fix any more definitely than the latter part of September?

"A. I couldn't; no, I cannot.

"Q. Is that the only time you have seen him in there?

"A. Yes, that is the only time I have seen him."

Q. Now, Mr. Latham, will you please go over this record that contains your direct examination, starting on page 416, and ending at the top of page 420, and your cross-examination starting at the top of page 420, and continuing down to 421, and point out to me, if you will, where you testified before that you were in there on a Sunday morning?

A. Well, now, Mr. Smith—

Q. Now, just please do as I ask you. I don't care for any volunteer statements.

The COURT.—What is it you want to say?

A. When Mr. Gillis asked me for a date on this, I presumed—

Mr. SMITH.—Now, if the Court please, I think I am entitled to an answer to my question.

The COURT.—Maybe that is so. I will let you answer the question first, and then you can make

(Testimony of W. K. Latham.)

any explanation you wish. Is this testimony that was taken to-day?

Mr. SMITH.—No, your Honor, that is the testimony that was taken during the last trial. It is only three or four pages.

A. I don't see anything in there saying anything about Sunday morning, no, sir.

The COURT.—Q. Now, do you want to say anything in addition to that?

A. If your Honor please, I would like to say this: Mr. Gillis tried to get me, or asked me, in other words, to fix an exact date. I presume he meant the date of the month I was in there, which I could not do. Gorham [177] came upon the stand and testified he never saw me before in his life, and that when I said he was in this place that he was in the police court. I came to remember that it was on a Sunday morning that I was in that place and he could not have been in the police court. That is the correction I want to make to that testimony, and I am going to stand by my former testimony, and also add that it was Sunday morning, and that there is no mistake about it.

Mr. SMITH.—Q. You never thought it sufficiently important to say it was Sunday morning, until after you had learned that Mr. Gorham had filed an affidavit in support of a motion for a new trial to the effect that he had been in the police court every morning during the month of September after he came back from his vacation?

(Testimony of W. K. Latham.)

Mr. BONSALL.—Just a minute. Ask him, first, if he knew that the sergeant made any such statement.

A. When Mr. Gorham got up on the stand and testified he never had seen me before in his life, and that he was in the police court when I said that he was in this place, it came to my mind that when I seen him in there it was on a Sunday morning, and he could not have been in the police court. If you call that calling Sergeant Gorham a liar, I guess you will have to call it that.

WITNESS.—(Continuing.) I had these facts in mind the very minute he testified in that other trial. I did not go up and offer any further evidence; I did not tell the District Attorney I would go back on the stand. I should have done so right then and there. I naturally had all those facts in mind ever since the man testified he was in the police court. When I saw him in this place, he could not have been in the police court because it was on Sunday morning. I had those facts in mind this morning when [178] I answered your question. It was Sunday morning. I will correct the statement that I testified on the former trial that it was on Sunday morning. It was the latter part of September, and on a Sunday morning. I did not formerly testify it was Sunday morning, according to that testimony here, which I presume is correct. It really did not enter my mind that I did not testify to that fact until I got on the stand here. I knew then, when I came off the stand and heard Sergeant Gorham deny that

(Testimony of W. K. Latham.)

he had been in the place that it occurred to me it was Sunday morning. I did not know perfectly well that I had not testified it was Sunday morning. I testify it was Sunday morning. I testified it was in the latter part of September, but it was on a Sunday morning. I did not testify at the last trial that it was on a Sunday morning.

During my examination on the last trial, I did not make any reference to the manner in which Sergeant Gorham eyed me up when I was in the place, and as to his mannerisms toward me. It does not show there in the testimony. That did not occur to me at that time. I cannot say that it did. It occurs to me at this time because he did it. He came in there and looked at me in such a manner as to attract my attention, and I could not get away from his looks. This is two years afterwards.

Q. And it makes more of an impression on you, or at least the impression is more telling at this time than it was a year and a half ago?

A. Well, I will tell you. I was not volunteering any information that was not asked me; Mr. Gillis did not ask me anything about that, and so I did not volunteer any information except what he asked me.

WITNESS.—(Continuing.) I came here under subpoena in the other trial and in this trial, too. I have not any interest in this case [179] either one way or the other. I am sorry I got mixed up in it.

TESTIMONY OF JOSEPH S. CAMPLONG, FOR THE GOVERNMENT.

JOSEPH S. CAMPLONG, a witness called for the United States, and sworn, testified as follows:

Direct Examination.

(By Mr. BONSALL.)

I am a poultry farmer by occupation. I now live at Box 1497½, Route 2, Sacramento. I was formerly a federal prohibition officer. I was a federal prohibition officer about two years or over two years, approximately from January 8, 1924, to October 15, 1925. I am quite sure I was present at 1249 Polk Street on February 26, 1924, if I remember right at this time. I was there in February, 1924. I purchased intoxicating liquor in February of 1924, if I remember correctly. I purchased four drinks of Scotch whiskey. I am sure about the quantity. I know from whom I purchased it. It was a man whom I learned his name to be Eddie Marron. He was introduced to me as Eddie. I later on that day found it to be Marron. That is the defendant in this case, the man sitting at the far end of the table.

I went there originally for the purpose of making a purchase, but not of drink. I went there to make a deal for some case goods of whiskey. I did have a talk with Marron about the case goods. I was introduced to Marron, and I informed him, after a little talk there that I wanted to get about ten

(Testimony of Joseph S. Camplong.)

cases of whiskey, and I wanted to know if he could supply it. After a little talk with him, he said yes, he could. He wanted to know what kind I wanted, and I told him Black and White. That conversation took place in a little room which is off the kitchen at 1249 Polk Street, in this city. I did not get the case goods. I was running short of funds myself at the time, and I spoke to the Director, at that time Mr. Rutter, and he had promised [180] to advance the funds in any of those big cases, but it so happened, for some reason or other, I didn't get the money. If I remember correctly, I was there during the month of March, 1924. I paid for the drinks I got.

Cross-examination.

(By Mr. SMITH.)

The last date that I visited the place was in March, 1924. I gave no date; I don't quite remember the date in that case. I have looked over some of my former testimony in the District Attorney's office, about 9:30 this morning. I did not read very much of it, approximately one page. I didn't read a page; I just glanced at it. To the best of my knowledge I was only at 1249 Polk Street on one occasion, February 1924.

Q. I now show you a copy of your testimony appearing in Volume 2, page 67, and ask you to read, starting with the second question, with the words, "Were you present," down to the answer, ending

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(Testimony of Joseph S. Camplong.)

with "Scotch whiskey," and ask you if that is the testimony you gave at the former trial?

A. I don't know, but I believe it is; I cannot say for sure, you know, because it has been quite a long while ago.

Mr. SMITH.—Will you stipulate, Mr. Bonsall, in order to avoid the necessity of calling the reporter, that this is a correct transcript?

Mr. BONSALL.—I will so stipulate. I will not stipulate that the entire transcript is correct. I will not stipulate with reference to Mr. Bybee that it is correct, because I am going to bring the reporter here on that, but I will as to this witness, even though it is contrary to our interest.

Mr. SMITH.—I will read this:

"Q. Were you present at 1249 Polk Street on February 26, 1924? A. I was. [181]

"Q. Did you purchase any intoxicating liquor at that time? A. I did.

"Q. What kind of liquor did you purchase?

"A. Two drinks of Scotch whiskey."

WITNESS.—(Continuing.) I could not say exactly how long I have been a prohibition agent altogether. I know I took my oath of office January 8, 1924, and if I remember correctly, I left the service September 15, 1925—that is it—this is 1926. I think I said September 15 before, of 1926—that is a mistake. This is 1926. I meant 1925.

During that time I participated in quite a few raids, and I also made a great many purchases of liquor before being on the raid. At the time I vis-

(Testimony of Joseph S. Camplong.)

ited the place of Mr. Marron in March, I had not had considerable experience in the matter of securing evidence from the persons who were violating the law—not very much. I had been in the service two months. During those two months I was on the investigation of rum-runners. It was my business during those two months at that time to locate such places as were likely to be landing places for rum, also to find out who the different smugglers were in the city, where their headquarters or hang-out places were, and also various other things. I worked under special direction at that time from Mr. Rutter, who was then the Director, and his field agent in charge, Harold H. Dolley. Once in a great while in addition to performing the duties I have described, I also acted as an under-cover agent. I couldn't say how often. Whenever I was called. If I was called on for some special job, and was asked to go out and attempt to make a purchase, I did it. I am familiar with the duties of an under-cover agent; quite so. His duties are, in the first place,—a man that is serving as an under-cover agent, it is his duty to visit places that are suspected of selling liquor [182] in violation of the law. It is his duty there to attempt or try in some manner, using a disguise if necessary, to enter such a place. If he shall succeed, it is then his duty to try and purchase. If he makes a purchase, of course if he has a chance and can do so without revealing himself, or letting it be known that he is a secret agent, he might make notes of any purchase

(Testimony of Joseph S. Camplong.)

or of any conversation that might take place in there; there are times when you can do that, and there are times when you cannot. After he has made a purchase—of course there were some changes in that at that time, but it is usually the case when he makes a purchase—he is supposed on that day or that night, or as soon as he can, to render a buy report, and also a daily report, showing his activities for that date. On the strength of the buy report, he goes to the Commissioner, who issues a search-warrant for the place. Then, at that time, we did not do that—not all of the agents, and, as I was on special duty, I did not have to go before the Commissioner. In other words, my identity was to be kept concealed at all times from everyone. Very few agents knew me as a secret service man at that time—and not for about six months after I was in the service, and then they finally found out.

I reported to my chief after having secured the drinks at 1249 Polk Street on the 26th of February, 1924. I made a report orally. I never made a written report—not that I remember; not at that time. I was not serving in the capacity to get a warrant for the place; it was merely to verify whether the place was being used to serve liquor. I merely witnessed that fact, that liquor was being served there, and that that was the headquarters of a certain gang. I am pretty sure I did not make any written reports at that time. If I remember right, I think I wrote one report on the case later

(Testimony of Joseph S. Camplong.)

on, but I don't remember whether [183] it was at that particular time. It was my duty at that time to go out and seek evidence of the type—of case goods. I was not assigned to that detail, to go out and make buys in that particular case, and I will explain it in this way: When I went there after the case goods, I was going there not only to get the case goods if I could, but to find out for sure if that was the headquarters of the smugglers I had in mind. I do not know, as a matter of fact, that no money is ever passed by the agents to any person who is suspected of selling liquor until such time as the actual delivery of the goods is made. That depends entirely on the agent that is operating in the case. He may use most any method of procedure. I cannot say that I know of any agent who ever paid for 10 cases of liquor prior to the time of its delivery. That is entirely up to the officer, if he wants to take the chances on losing the money.

TESTIMONY OF JOHN J. CASEY, FOR THE GOVERNMENT.

JOHN J. CASEY, a witness called for the United States, and sworn, testified as follows:

Direct Examination.

(By Mr. BONSALL.)

I am a Captain of Police, and have been such for about two years and three months. I am in charge of the Bush Street Station. I have been in charge

(Testimony of John J. Casey.)

of that station two years ago last February. 1249 Polk Street in this city is within the precinct that I have charge of. I know a man by the name of Joseph Gorham. I have known him about 22 years. He was a police officer attached to my station while there. He was attached to that station from about March to November of 1924. I know a man by the name of Patrick Kissane. I should say I [184] have known him about the same length of time, during my time in the police department. He was attached to the Bush Street Station while I was there. He was attached there as a police officer since I have been in charge there. Joseph Gorham was a Sergeant of Police. He was assigned in charge of special detail, investigating complaints, investigating burglaries, robberies, violations of the prohibition law, prostitution and gambling. All reports in reference to police matters made by patrolmen and others under me in that precinct passed through my hands. I would be familiar with the signature of Patrick Kissane and Joseph Gorham; the document that I have been shown is a miscellaneous police report, submitted by former Sergeant Joseph Gorham in answer to a complaint received from the Chief of Police, May 26, 1924, for 1249 Polk Street, and that is his signature.

Mr. BONSALL.—I offer it in evidence as our exhibit next in order.

(Thereupon the document was here introduced in evidence as United States Exhibit No. 20.)

(Testimony of John J. Casey.)

Said exhibit was and is in the following words and figures, to wit:

(Here insert exhibit.)

WITNESS.—(Continuing.) That is an official record of the Police Department, and kept in the ordinary course of business. The document that I am now being shown is a miscellaneous report made out by former Sergeant Joseph Gorham in answer to a communication from the office of the Chief of Police on October 14th. I know that that is Gorham's signature, and received by me in the course of my regular official business, or passing through my hands.

(Thereupon the document was here introduced in evidence, as United States Exhibit No. 21.)

Said exhibit was and is in the following words and [185] figures, to wit:

(Here insert exhibit.)

WITNESS.—(Continuing.) The document that I am now being shown contains the signature of Sergeant Joseph Gorham, and it is a report on the same premises. I know his signature.

(Thereupon the document was here introduced in evidence, as United States Exhibit No. 22.)

Said exhibit was and is in the following words and figures, to wit:

(Here insert exhibit.)

WITNESS.—(Continuing.) The document that I am now being shown is a miscellaneous report made by Officer Patrick Kissane in reference to the same premises.

(Testimony of John J. Casey.)

(Thereupon the document was here introduced in evidence, as United States Exhibit No. 23.)

Said exhibit was and is in the following words and figures, to wit:

(Here insert exhibit.)

WITNESS.—(Continuing.) The report that I am now being shown is a report made by Sergeant James Farrell, of the Bush Street Station. In substance it states that relative to information requested by the Chief of Police, as to the illegal sale of liquor at 1249 Polk Street, he reports that it is a flat occupied by George Birdsall for some time past, and that he saw no evidence of the sale of liquor. This other one is a miscellaneous report by Officer James Twohig. This one is a report by Kissane, and that is his signature, and covers 1249 Polk Street, and is dated March 30th. The substance of that report is relative to complaint from the Chief of Police about bootlegging conditions at 1249 Polk Street. On investigating I find that it is a six-room flat occupied by a man named George Birdsall. I have had an interview with the latter at the said address with regard to the above, and he denied that bootlegging was being carried on [186] at this place. I went through all of the rooms in the flat and did not see any evidence of the sale of liquor there.

(Thereupon the document was here introduced in evidence, as United States Exhibit No. 24.)

(Testimony of John J. Casey.)

Said exhibit was and is in the following words and figures, to wit:

(Here insert exhibit.)

WITNESS.—(Continuing.) These two slips that I am now being shown are the suspect for "illegal liquor selling." It is dated March 3d. This looks to be 1221 Polk Street, a restaurant. There may be something further down about 1249. Yes, 1249 Polk Street, flat, second floor, George Birdsall, Proprietor. That report was made by Police Officer Kissane. Patrick Kissane and Joseph Gorham were defendants in the last trial.

(Thereupon the document was here introduced in evidence, as United States Exhibit No. 25.)

Said exhibit was and is in the following words and figures, to wit:

(Here insert exhibit.)

WITNESS.—(Continuing.) I visited 1249 Polk Street myself shortly after taking charge of the company, probably a week or so after I took charge of the company. I had not received any complaints about the place up to this time but I visited the place about a week after taking charge of the company. I could not say just what date it was. I saw George Birdsall; I saw the defendant, Eddie Marron.

EXCEPTION No. 66.

Q. Did you ever speak with the defendant, Eddie Marron, regarding the premises at 1249 Polk Street?

(Testimony of John J. Casey.)

Mr. SMITH.—We object to that as immaterial, irrelevant and incompetent, no time has been fixed, and it is not shown that such matter could have anything to do with the issues now being tried here. [187]

The COURT.—I presume it is preliminary. Objection overruled.

Mr. SMITH.—Exception.

A. I spoke to Eddie Marron about the premises some time in October.

WITNESS.—(Continuing.) In October, 1924, that conversation took place at 1249 Polk Street. I had some conversation with him about the entries in the gray ledger.

EXCEPTION No. 67.

Mr. SMITH.—Now, just a second. May my general objection be considered as having been made again at this time in respect to United States Exhibit No. 1?

The COURT.—Yes. Objection overruled.

Mr. SMITH.—Exception.

WITNESS.—(Continuing.) I never saw the book, Government's Exhibit No. 1. I saw Mr. Marron and he made a report. I received a communication from the Chief of Police on October 6, 1924. On October 7th I interviewed Eddie Marron in reference to the memorandum book and the items referred to in the communication. Marron stated to me that he disposed of his interest to George Birdsall, who had been paying

(Testimony of John J. Casey.)

him on monthly payments. He stated that he had no knowledge of the book mentioned in the communication. I asked him if he had ever paid any money to police officers, and he denied it. He admitted that he had visited the premises at 1249 Polk on numerous occasions but he stated that he never seen Officer Kissane on the premises. I asked him to write the words "Kissane" and "Police" on a piece of paper, but this he refused to do. I have a copy of the report. Marron did not state when he had disposed of the place to Birdsall.

Q. Just a moment and I will call your attention to your testimony [188] at the last trial, Captain. I call your attention, Captain, to what purports to be a transcript of your testimony at the last trial, and I will ask you to read from this part, commencing, "Mr. Smith. All right, Captain," down to "Mr. Gillis," on page 190.

Mr. SMITH.—What page is that?

Mr. BONSALL.—190. I think on page 189 is where the statement is made as to when Marron said he sold out.

Q. Is that testimony correct, Captain?

A. Yes, sir.

Q. That refreshes your recollection, does it?

A. Yes.

Q. And it was correct at the time you gave it, and it is correct now? A. Yes.

Q. What did Eddie Marron say regarding when that change took place?

(Testimony of John J. Casey.)

A. He said that he had disposed of it about a year previous.

Q. When was that? What time would that be, a year previous?

A. I had the conversation with him in October.

Q. See if this refreshes your recollection from this testimony here, Captain: "A year ago September."

A. Yes, that is correct, a year ago September.

TESTIMONY OF JENS JOHAN NEILSEN, FOR THE GOVERNMENT.

JENS JOHAN NEILSEN, a witness called for the United States, and sworn, testified as follows:

Direct Examination.

(By Mr. BONSALL.)

I live at Sausalito, in San Rafael, in the County Jail. I know the defendant, Marron, the man over there.

EXCEPTION No. 68.

Mr. BONSALL.—Q. Did you ever see him at 1249 Polk Street [189] in the City and County of San Francisco?

Mr. WISEMAN.—The same objection, your Honor, unless a time is specified.

The COURT.—Objection overruled.

Mr. WISEMAN.—Exception.

A. Yes, I met him up there.

EXCEPTION No. 69.

Mr. BONSALL.—Q. When was it that you visited 1249 Polk Street in this city?

(Testimony of Jens Johan Neilsen.)

A. It is so long ago that I cannot remember exactly.

Q. Well, approximately? Can you fix it by any occurrences that happened, like boats that you might have owned?

A. It was sometime before I lost my boat in 1924.

Q. What boat do you refer to?

Mr. WISEMAN.—We object to that as immaterial, irrelevant, and incompetent, and not binding on this defendant.

The COURT.—Objection overruled.

Mr. WISEMAN.—Exception.

A. That was the boat "839," I believe.

Q. The boat "B-839"? A. Yes.

EXCEPTION No. 70.

Q. What became of the "B-839"?

Mr. WISEMAN.—The same objection, your Honor.

The COURT.—Objection overruled.

Mr. BONSALL.—I am trying to fix a time.

The COURT.—I understand. It is preliminary.

Mr. WISEMAN.—Exception.

A. It sunk, almost.

EXCEPTION No. 71.

Mr. BONSALL.—Q. Do you know about what date the boat sunk? [190]

Mr. WISEMAN.—The same objection.

The COURT.—Objection overruled.

Mr. WISEMAN.—Exception.

(Testimony of Jens Johan Neilsen.)

A. On the 17th of March.

Mr. BONSALL.—Q. 1924? A. Yes, sir.

EXCEPTION No. 72.

Q. And it was about that time that you were going to 1249 Polk Street, in this city?

A. Just about.

Q. Did you buy any liquor there?

A. Well, I think I bought a glass of Scotch whiskey.

Q. And it was about that time that you saw the defendant, Eddie Marron, there?

A. Yes, I believe I saw him at that time.

Q. Did you have any other business at 1249 Polk Street, other than going there to get a drink?

Mr. WISEMAN.—We object to that as immaterial, irrelevant and incompetent, and on the further ground that any business that he might have had at 1249 Polk Street is not binding on the defendant, unless there is a *prima facie* case of conspiracy established; and on the further ground that it is an attempt to show or prove an overt act not alleged to be in furtherance of the conspiracy—not alleged in the indictment.

The COURT.—Objection overruled. It is preliminary. We don't know what they are attempting to prove, yet.

Mr. WISEMAN.—Exception.

EXCEPTION No. 73.

Mr. BONSALL.—Q. What other object did you

(Testimony of Jens Johan Neilsen.)

have in visiting 1249 Polk Street, except to get a drink?

Mr. WISEMAN.—The same objection.

The COURT.—Objection overruled.

Mr. WISEMAN.—Exception.

A. I went there to get an order to go out to the "Malahat." [191]

EXCEPTION No. 74.

Mr. WISEMAN.—We move to strike out the answer on the same grounds urged in our objection.

The COURT.—Motion denied.

Mr. WISEMAN.—Exception.

EXCEPTION No. 75.

Mr. BONSALL.—Q. When you refer to the "Malahat," what boat is that?

Mr. WISEMAN.—The same objection.

The COURT.—Objection overruled.

Mr. WISEMAN.—Exception.

A. That is a rum ship.

EXCEPTION No. 76.

Mr. BONSALL.—Q. That is a rum ship, or was?

A. Yes.

Q. Did you get that order?

A. Yes, as far as I remember, I did.

Q. Who did you get it from?

A. Well, I believe I got it from Eddie Marron.

Q. Did you go out to the "Malahat" with that order?

Mr. WISEMAN.—Just a moment. We make

(Testimony of Jens Johan Neilsen.)

the same objection, your Honor, and upon the further ground that it is an attempt to show or prove an overt act not alleged to be in furtherance of the conspiracy, and directly on all fours with the Terry Case.

The COURT.—Objection overruled.

Mr. WISEMAN.—Exception.

EXCEPTION No. 77.

Mr. BONSALL.—Q. Did you go out to the "Malahat" with that order? A. Yes, sir.

Q. Did you get liquor from the "Malahat" on that order?

Mr. WISEMAN.—The same objection.

The COURT.—Objection overruled.

Mr. WISEMAN.—Exception. [192]

A. I did.

EXCEPTION No. 78.

Mr. BONSALL.—Q. What boat did you have?

A. I had the "H-39."

Q. Did you bring this liquor back to the shore from the "Malahat"?

Mr. WISEMAN.—The same objection, your Honor. In the interest of time, may it be stipulated that the objection will run to whatever testimony is elicited from this witness with respect to the incident of the "Malahat"?

The COURT.—Yes; objection overruled.

Mr. WISEMAN.—Exception.

A. Yes.

(Testimony of Jens Johan Neilsen.)

EXCEPTION No. 79.

The COURT.—Q. How much did you bring back?

A. Well, if I remember right it was about 100 cases.

Q. Of what? A. Scotch.

Q. Scotch whiskey? A. I think it was, yes.

Mr. BONSALL.—Q. Where was that landed?

A. That was landed somewhere around Mission Rock, between Piers 46 and 54.

Q. What time were those 100 cases landed, what time of the day or night?

A. It was in the evening, I don't know exactly what hour.

Q. Was it dark? A. Yes, sir.

Q. Who were there at the time this liquor was landed?

Mr. WISEMAN.—If your Honor please, as far as the incident of the "Malahat," and the liquor, and the landing of the liquor, we renew the objection on the ground it is immaterial, irrelevant and incompetent, and, further, it is an attempt to show an overt act not alleged in the indictment, either measured by the indictment, itself, or by the testimony as elicited during the trial. [193]

The COURT.—Objection overruled. As I understand it, every overt act does not have to be alleged.

Mr. WISEMAN.—But the conspiracy must be measured by the allegations of the indictment, or the testimony elicited from the witness on the

(Testimony of Jens Johan Neilsen.)

trial. The same situation developed in the Terry case.

The COURT.—Objection overruled.

Mr. WISEMAN.—Exception.

WITNESS.—(Continuing.) I do not know who was present at the time I brought that load ashore. I do not know. I was paid for that load at 1249 Polk Street, in the City and County of San Francisco. I was paid $3.00 a case. I was paid $300 in currency by Eddie Marron personally. I don't know how long after the liquor was landed that I went to 1249 Polk Street and received my pay. I don't know, maybe a day or two. I am not sure, not very long afterwards.

EXCEPTION No. 80.

Q. Did you make any other trips on orders furnished by the defendant?

Mr. WISEMAN.—The same objection, your Honor.

The COURT.—Objection overruled.

Mr. WISEMAN.—Exception.

A. I made one on the 17th of March.

The COURT.—Q. That is the one you have just testified to, isn't it?

A. No, that was before that.

EXCEPTION No. 81.

Mr. BONSALL.—Q. On the 17th day of March of what year?

A. If I remember right it was 1924?

Q. You had an order from Eddie Marron?

(Testimony of Jens Johan Neilsen.)

A. Yes, sir.

Q. Where did you go with that order?

A. To the "Prince Albert."

Q. Did you get that order filled at the "Prince Albert"? [194]

Mr. WISEMAN.—We make the same objection to the "Prince Albert" incident as we made to the "Malahat" incident, and to the incident of the landing of the liquor.

The COURT.—Very well; objection overruled.

Mr. WISEMAN.—Exception.

A. Yes, sir.

WITNESS.—(Continuing.) I did not land that liquor because I got swamped during the night. I never got paid for that liquor. I went to Marron and told him how it happened. I went to see him at 1249 Polk Street in this City and County and State. I went to see him there after it happened, about a day or two after I came ashore. I just told him I lost them, and he told me it was too bad that I had to lose my boat. I did lose my boat at that time. I took off 150 cases from the "Prince Albert." There was some champagne and some Scotch. I was to get the same price for that, $3.00 a case. He did not make any other reference to the loss of that liquor the defendant Marron. I think I made one more trip later on for the defendant, after that. I don't know exactly, it was between that time and probably two or three months later. I don't know. I am not sure.

(Testimony of Jens Johan Neilsen.)

EXCEPTION No. 82.

Q. What boat did you make that trip with?

Mr. WISEMAN.—Just a moment. We renew our objection to this incident, the same as to the other incidents, upon the same ground.

The COURT.—Very well; objection overruled.

Mr. WISEMAN.—Exception.

WITNESS.—(Continuing.) I had an order at that time furnished by the defendant, Marron. I was to go to the "Malahat," if I remember right. I did go to the "Malahat"; I did present the order. I went out there on the boat that the Government seized. The name [195] of the boat was the "L. C. L." They gave me the liquor on that order, and I loaded it on the "L. C. L." I brought the liquor ashore. I think it was 150 cases; I think it was landed on pier 20, between pier 20, or 22, in this city. It was around midnight that I brought it ashore. I saw the defendant, Marron, at that time. I believe I did. No, I don't think I saw him when I first came ashore at that time. I don't think then, but he came right afterwards. I waited around a while and then he made his appearance. It took me about an hour and a half to get the liquor up on the wharf. I saw a truck on the shore; there was a truck standing there. I got paid for carting that liquor, at 1249 Polk Street in this city. I saw the defendant there. Eddie Marron paid me for this lot of liquor, Eddie Marron himself. It was about a day or two after the liquor was landed on shore

(Testimony of Jens Johan Neilsen.)

before I went to get my money. He paid me $3.00 a case. All told that would be $450. He paid me in currency; he usually paid me in one of the front rooms at 1249 Polk Street.

Cross-examination.

(By Mr. WISEMAN.)

I have been convicted of a felony. I am convicted in the last case. At the present time I am located in the County Jail at San Rafael. I have never been indicted for any of these activities I am describing on the witness-stand. I did not testify in the previous trial in this matter. I remember the time that this case was first tried, a year ago. I remember reading about it in the newspapers. I did not go to any official of the Government at that time, and tell them of my activities with respect to these incidents I have been describing on the witness-stand, that I know of. I would know if I went and told them; I guess I would. The first time that I spoke to any officer or official of the Government with respect to these [196] activities I have been describing on the witness-stand was when Mr. Reed came up there to San Rafael about a week ago. Mr. Reed is the man sitting alongside of Mr. Bonsall. Mr. Reed said he was from Mr. Oftedal's office. I had not met that gentleman previous to the time when I met him a week ago. I have been in the County Jail at San Rafael pretty near two months. Up to the time Mr. Reed came to me, no other official

(Testimony of Jens Johan Neilsen.)

from the Government came to visit me at that place. I did not communicate in writing with anybody during that period of time, connected with the United States Government.

Q. After you were convicted of a felony and sentenced to the County Jail in San Rafael, you were indicted by the United States Government, were you not, in respect to certain liquor violations?

Mr. BONSALL.—What have you reference to? How would he know.

Mr. WISEMAN.—He probably would be served with a copy of an indictment.

The COURT.—Q. Do you know?

A. No, I have not been served with any.

Mr. HATFIELD.—He has not been indicted, if you want to know.

Mr. WISEMAN.—My information is that there was an indictment returned against him. I think it was last week.

Mr. SMITH.—I think the record will show that an indictment was returned against him for violating the Tariff Act.

Mr. BONSALL.—He was a defendant in the Parente case.

Mr. HATFIELD.—There have been no indictments since the Parente case.

Mr. SMITH.—The record will show that Mr. Neilsen was indicted and was in court here last week and was arraigned on the indictment, and the matter has gone over until sometime next week.

(Testimony of Jens Johan Neilsen.)

The COURT.—Well, whatever the record shows is right. [197]

Mr. WISEMAN.—We will produce the record.

The COURT.—It is here, if there is a record.

Mr. WISEMAN.—Yes, I will get it from the clerk's office.

The COURT.—But what difference does it make?

Mr. WISEMAN.—I want to show that he has been indicted on another matter. I will show the connection in just a minute.

WITNESS.—(Continuing.) Mr. Reed visited me about a week ago, something like that, something approximately a week ago. He told me at that time that he wanted me to be a witness in the Marron case. I did not tell him that I knew of any facts in connection with the Marron case. He told me how he ascertained that I was familiar with the facts in the Marron case. Mr. Reed did not tell me at that time that if I appeared as a witness in the Marron case, that is, the case on trial at the present time, that they would endeavor to secure a lighter sentence for me in the County Jail at San Rafael. He did not tell me that they would make an effort to see I was not indicted on any other charge. He did not tell me that I could be indicted for my activities that I described here this afternoon. He did not tell me that the Government was seeking to indict me on any other charge. He did not tell me that they contemplated taking any action against me. He did not tell me that if I testi-

(Testimony of Jens Johan Neilsen.)

fied here in the Marron case that he, or some member of the District Attorney's office, or Internal Revenue Office, would make some effort to lighten or mitigate the sentence I am now serving in San Rafael. He did not make any promise of any kind to me in consideration of my testifying here this afternoon. I told him I did not think I could tell him anything. I told him the facts that I have testified to here this afternoon for the simple reason that I made a statement to Mr. Creighton in an offhand way that I thought I hauled one load for Eddie [198] Marron at that time. Then Mr. Reed came with a piece of paper and showed me where I hauled several loads for Mr. Marron, and that my name was signed to it. My name was not signed to the paper that he exhibited to me. I don't think so; I didn't see it. He told me that I hauled several loads for Mr. Marron. I did not look at the paper. He read it to me. He said my name was signed to the statement that I made for Mr. Creighton, and that he got it out of that statement. He did not tell me that if I refused to testify here this afternoon in the Marron case that they might reindict me, or indict me on some of the matters that were contained in the piece of paper he had in his possession. We spoke only a few words. He told me I ought to testify or something to that effect. I told him I did not think I had anything I could enlighten him on. Mr. Reed told me he thought I ought to testify, and I don't think he

(Testimony of Jens Johan Neilsen.)

told me I had better testify. He told me that he would like me to testify in Eddie Marron's case. It might have been that he said that I had better testify if I know what is good for me, or words to that effect. I think he did tell me that I had better testify in this case if I knew what was good for me, but he did not promise anything at that time. He did not tell me he would intercede or speak to anybody for me in the event that I did testify here this afternoon. He did not tell me at that time that in the event I did not testify here this afternoon, he would report back to some official of the Government.

In addition to what I have already testified that he said, he pulled a piece of paper out of his pocket and he said, "You lost a boat, and you hauled a load of liquor for Eddie Marron on the 17th of March, and you lost your boat behind the 'Prince Albert,' with 150 cases on which were from the 'Prince Albert.'" I asked Mr. Reed where he got that statement. He told me he got it out of my statement that I made to Mr. Creighton. I told [199] him I never made any such statement to Mr. Creighton.

Mr. WISEMAN.—I want to introduce this indictment in evidence. It is No. 17,689; United States vs. Jens J. Neilsen and Kurt Hauschildt. This indictment charges violation of the Act of October 28, 1919, and of the Tariff Act of 1922. It was presented in court and filed in court on—I just

(Testimony of Jens Johan Neilsen.)

cannot make this out, but apparently April 5, 1926. That date is subject to correction.

WITNESS.—(Continuing.) I saw in the paper that I had been indicted since I have been incarcerated over at San Rafael. I had not been informed or told that I was re-indicted by the United States Government after I was convicted and sent over to San Rafael. I had not been informed—no one ever told me of this, except as I learned it in reading from the newspaper. I get a newspaper every day. I was reading the paper over there, and I saw it. Neither my wife nor any member of my family ever informed me that I was re-indicted, that I know of. Mr. Reed did not tell me that I was indicted, after my incarceration over at San Rafael, that I remember. I am positive he did not say anything of the kind. Mr. Reed did not tell me, nor did any member of the Internal Revenue office, or any other Government official, that they would do something for me about this new indictment, in the event I did come here this afternoon and testify. I did not have any conversation along these lines. I am positive of that. I was in court last week and arraigned on this very indictment we are now talking about, before his Honor, Judge St. Sure.

Redirect Examination.

(By Mr. BONSALL.)

I was in the County Jail prior to the time that I made the appearance on this indictment. That is only a week ago, or probably a little more. I am not

(Testimony of Jens Johan Neilsen.)

so sure, but it was [200] before then that Mr. Reed had been to see me. It is not two weeks ago. Mr. Reed had been to see me before I came here on this indictment, and he made no promise to me that I would not be indicted. First I told Mr. Reed that I did not care to testify. I am telling the truth under oath. Before appearing here I spoke to my attorney.

EXCEPTION No. 83.

Mr. WISEMAN.—For the purpose of the record, I make a motion at this time to strike out all of the testimony of the witness Neilsen in so far as these incidents concerning the landing of liquor from these various ships, together with the landing at the wharves, and its transportation, on the ground that it is immaterial, irrelevant and incompetent, they are not charged or alleged in the indictment on file herein on which the defendant, Marron, is now standing trial, they are not shown by either the indictment, or by the testimony, to have been done in furtherance of or for the purpose of effecting the object or purpose of the conspiracy.

The COURT.—Motion denied.

Mr. WISEMAN.—Exception.

TESTIMONY OF CHARLES D. O'CONNOR, FOR THE GOVERNMENT.

CHARLES D. O'CONNOR, a witness called for the United States, and sworn, testified as follows:

Direct Examination.

(By Mr. BONSALL.)

I am a notary public by occupation, and have been such for twenty-one years. The photostatic copy of affidavit of candidate, Joseph Edmond Marron, that I am now being shown, is a true copy of an acknowledgment taken by me. I took the [201] attestation to that original affidavit. I know the signature to be Joseph Edmond Marron, this defendant.

Mr. BONSALL.—If the Court please, I understand that Mr. Smith is willing to enter into a certain stipulation at this time regarding the transcript of the testimony taken by the shorthand reporter as to Mr. Bybee's testimony, the witness who testified here the other day. The original transcript shows that Mr. Bybee testified that he made a purchase there on November 27, 1924—

The COURT.—Made a purchase where?

Mr. BONSALL.—Made a purchase at 1249 Polk Street. I insisted at that time that that was an error in the transcript, that the witness testified at the last trial that he had made that purchase on September 27, 1924. I got in touch with Mr. Lehner, the stenographer who reported that trial. He is busy this morning over in Judge Kerrigan's court. He says his record shows, and he would so

(Testimony of F. D. Stribling.)

testify if he were here, that the witness Bybee testified at the last trial that he made this purchase on September 27, 1924, and not on November 27, 1924. Are you willing to stipulate that he would so testify if present, Mr. Smith?

Mr. SMITH.—I am willing to stipulate that September was testified to instead of November.

Mr. BONSALL.—And that the transcript was in error?

Mr. SMITH.—Yes, that that was a mistake in the transcript.

TESTIMONY OF F. D. STRIBLING, FOR THE GOVERNMENT.

F. D. STRIBLING, a witness called for the United States, and sworn, testified as follows:

Direct Examination. [202]

EXCEPTION No. 84.

Mr. SMITH.—So that our record may be complete, if the Court please, may the objection to this testimony be considered as having been made, as was made heretofore, with respect to all property seized at 1249 Polk Street?

The COURT.—Very well, Mr. Smith.

Mr. SMITH.—And an exception reserved.

(By Mr. BONSALL.)

My occupation is an Internal Revenue Chemist. I have been such for about five and one-half years. I am employed at the present time at Los Angeles, California, and have been employed there since September 1st of last year. Prior to that time I

(Testimony of F. D. Stribling.)

was employed in San Francisco, California. I was employed in San Francisco from,—I believe it was April, 1921, that I came to San Francisco, and left in September, 1925. During all of the time that I was here in San Francisco, I was employed by the Internal Revenue Bureau. My duties were to test liquor, narcotics and similar samples. I was employed as chemist. I have seen this bottle before, marked U. S. Exhibit No. 12 for Identification, Chemist's Number 27939. I saw it in room 63, Appraisers Building, San Francisco. I made a chemical analysis of the contents of that bottle, as to its alcoholic content, shortly after October 3, 1924; in the usual course of my work I made the analysis. I found the alcoholic content to be 12.12 per cent of alcohol by volume, fit for beverage purposes.

EXCEPTION No. 85.

(Thereupon the bottle, No. 27939, was here introduced in evidence, as United States Exhibit No. 12.)

Mr. SMITH.—Subject to the objection that heretofore has been made, your Honor?

The COURT.—Yes, Mr. Smith. Objection overruled. [203]

Mr. SMITH.—Exception.

WITNESS.—(Continuing.) I have seen before the bottle marked Exhibit No. 10 for Identification, Chemist's Number 27936, at the same place. I made an analysis as to its alcoholic content, and found the alcoholic content of that bottle to be 19.96 per cent alcohol by volume, fit for beverage purposes.

(Testimony of F. D. Stribling.)

EXCEPTION No. 86.

Mr. BONSALL.—We offer that as Exhibit No. 10 in evidence.

Mr. SMITH.—The same objection.

The COURT.—The same ruling.

Mr. SMITH.—Exception.

(Thereupon the bottle, No. 27936, being a one-fifth gallon bottle full of Port Wine, was here introduced in evidence, as United States Exhibit No. 10.)

WITNESS.—(Continuing.) I have also seen before this bottle marked U. S. Exhibit No. 14 for Identification, Chemist's Number 27940, at the same place, No. 63 Appraisers Building. I made a chemical analysis of that as to its alcoholic content, and found it to be 5.37 per cent alcohol by volume, fit for beverage purposes.

EXCEPTION No. 87.

Mr. BONSALL.—We offer this in evidence as U. S. Exhibit 14 in evidence.

Mr. SMITH.—The same objection.

The COURT.—The same ruling.

Mr. SMITH.—Exception.

(Thereupon, the bottle No. 27940, being a pint bottle about one-third full of Rainier Beer, was here introduced in evidence and marked U. S. Exhibit No. 14.)

WITNESS.—(Continuing.) I have seen before this bottle marked U. S. Exhibit No. 13 for Identification, Chemist's Number 27938, at 63 Appraisers Building. I made a chemical analysis of the con-

(Testimony of F. D. Stribling.)

tents of this bottle shortly after October 3, 1924, in the [204] usual course of my work. I found the alcoholic content to be 50 per cent by volume, fit for beverage purposes.

EXCEPTION No. 88.

Mr. BONSALL.—We offer this as U. S. Exhibit 13 in evidence.

Mr. SMITH.—The same objection.

The COURT.—The same ruling.

Mr. SMITH.—Exception.

(Thereupon, the bottle No. 27938, being a one-fifth gallon bottle one-half full of Bourbon Whiskey, was here introduced in evidence and marked U. S. Exhibit No. 13.)

WITNESS.—(Continuing.) I have also seen before this bottle marked U. S. Exhibit No. 11 for Identification, Chemist's No. 27937, at the same place, and, in the usual course of my employment, I made an analysis of that as to its alcoholic content. I found the alcoholic content to be 17.60 per cent by volume, fit for beverage purposes.

EXCEPTION No. 89.

Mr. BONSALL.—This is offered in evidence as Exhibit 11.

Mr. SMITH.—The same objection.

The COURT.—Same ruling.

Mr. SMITH.—Exception.

(Thereupon, the bottle No. 27937, being a one-fifth gallon bottle full of Sherry Wine, was here introduced in evidence and marked U. S. Exhibit No. 11.)

(R. Tr., Vol. 4, pages 182 to 186.)

TESTIMONY OF GEORGE NEARY, FOR THE GOVERNMENT.

GEORGE NEARY, a witness called for the United States, and sworn, testified as follows:

Direct Examination.

(By Mr. BONSALL.)

My occupation is a Federal Prohibition Agent. I was a [205] Prohibition Agent on May 15, 1924. On that date I visited 1249 Polk Street in this city. I had a search-warrant for that place. We found 44 quarts of wine, 2 gallons of gin, 1 gallon jug half full of whiskey and 3 sacks of whiskey. I don't know whose place it was that I searched.

Mr. BONSALL.—I ask the Clerk to produce the search-warrant in that case and the record in case No. 15018.

Mr. SMITH.—I don't think you will find the search-warrant in the record.

Mr. BONSALL.—Let us have the record, anyway.

Mr. SMITH.—I will stipulate as to what the record shows, if you want me to.

Mr. BONSALL.—What will you stipulate to?

Mr. SMITH.—I will stipulate that No. 15018 is an action entitled U. S. of America vs. George Birdsall, setting forth a violation of the National Prohibition Act that occurred at 1249 Polk Street on about the 15th day of May, 1923.

Mr. BONSALL.—And that he was convicted and paid a fine?

Mr. SMITH.—Yes.

(Testimony of George Neary.)

Mr. BONSALL.—For a violation of the National Prohibition Act?

Mr. SMITH.—Yes.

Cross-examination.

(By Mr. SMITH.)

I arrested Mr. Birdsall at that time.

TESTIMONY OF I. D. DWYER, FOR THE GOVERNMENT.

I. D. DWYER, a witness called for the United States, and sworn, testified as follows: [206]

Direct Examination.

(By. Mr. BONSALL.)

My occupation is a Deputy Registrar of Voters, San Francisco. I have been such for 26 years. I have the roster of voters for Precinct 36, District 27 here. That is an official record of the City and County of San Francisco, kept in my custody. I know a man by the name of Charles A. Sankey. He was inspector of election in that precinct in 1924. He was inspector in an election held there in this city, November 4, 1924.

EXCEPTION No. 90.

Mr. BONSALL.—I am going to offer this in evidence. This shows the name of George Birdsall, on page 92. This is an official record. I offer it for identification at this time and request that counsel stipulate that it may be returned to this witness.

Mr. SMITH.—What is the purpose of it?

(Testimony of I. D. Dwyer.)

Mr. BONSALL.—I will have a photostat copy made if you insist upon it.

Mr. SMITH.—What is the purpose of it?

Mr. BONSALL.—I presented some affidavits of registration here the other day, and you seemed to feel that I had not connected up the signature of this defendant. I think I can do that.

Mr. SMITH.—We object to its introduction as immaterial, irrelevant and incompetent. There is no relevancy whatever shown.

Mr. BONSALL.—I offer it for identification.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

(The document was marked U. S. Exhibit 26 for Identification.) [207]

(Thereupon the document was here introduced in evidence, as United States Exhibit No. 26 for Identification.)

Said exhibit was and is in the following words and figures, to wit:

(Here insert exhibit.)

WITNESS.—(Continuing.) I have with me the roster of voters for Precinct No. 54, District 31. That is an official document of the City and County of San Francisco, kept in my charge in the regular files.

EXCEPTION No. 91.

Mr. BONSALL.—I refer to page 162, Mr. Smith, of this roster. There appears on that page the name of Joseph E. Marron. This will be offered in evidence for identification.

(Testimony of I. D. Dwyer.)

Mr. SMITH.—The same objection as formerly made.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

(The document was marked U. S. Exhibit 27 for Identification.)

(Thereupon the document was here introduced in evidence, as United States Exhibit No. 27 for Identification.)

Said exhibit was and is in the following words and figures, to wit:

(Here insert exhibit.)

WITNESS.—(Continuing.) I know a man by the name of L. H. Breidenstein. He was an inspector of elections in that precinct. He was inspector of elections in that precinct held on November 3, 1925.

TESTIMONY OF CHARLES A. SANKEY, JR., FOR THE GOVERNMENT.

CHARLES A. SANKEY, Jr., a witness called for the United States, and sworn, testified as follows: [208]

Direct Examination.

(By Mr. BONSALL.)

My occupation is an insurance clerk. I have served on an election board in the City and County of San Francisco the last two times as inspector; inspector of elections in the 27th district. I could not hazard a guess as to the precinct. I served as such on November 4, 1924. I have seen Government

(Testimony of Charles A. Sankey, Jr.)

Exhibit No. 26 for Identification before, because I recognize my own signature on it. On line 92 there appears "George L. Birdsall, 519 Belvedere Street."

EXCEPTION No. 92.

Q. Did he vote at that election?

Mr. SMITH.—Just a second. Let us find out, first, if the witness knows George Birdsall.

Mr. BONSALL.—No. I can show it this way, that this registration certificate was acted upon.

The COURT.—Objection overruled.

Mr. SMITH.—Do you know Mr. Birdsall?

The COURT.—Just a minute, Mr. Smith. The objection is overruled.

Mr. SMITH.—I object to the testimony on the ground that it is immaterial, irrelevant and incompetent, there is no identification of the individual Birdsall, there is no identification so as to show that the individual there named is the same person who has been named as a co-conspirator with the defendant, Marron, now on trial.

The COURT.—Objection overruled.

Mr. SMITH.—Exception. And no foundation laid for its introduction.

WITNESS.—(Continuing.) George Birdsall, 519 Belvedere Street, voted in that election on a registration in this city. We checked [209] the registration, and I find that he voted on a registration previously made.

EXCEPTION No. 93.

Mr. BONSALL.—We offer this in evidence, now.

(Testimony of Charles A. Sankey, Jr.)

Mr. SMITH.—We object to its introduction because there is no foundation laid, and because it is immaterial, irrelevant and incompetent.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

Cross-examination.

(By Mr. SMITH.)

I know the individual, George Birdsall, who signed that name. He is a man about 6 feet high, I should judge, weighing 200 pounds, rather a florid complexion. I think he has lived in the district a matter of five or six years, possibly more. I lived close to him. We are neighbors. We cannot very well be anything but neighbors in a precinct like that. It is quite thickly populated. I think our precinct has about three blocks in it. I am familiar with Mr. Birdsall's signature, as I see it there. I probably saw him sign that signature there. I positively know that is his signature because I know that when Mr. Birdsall came in to vote I was at the precinct. From deduction I know that is his signature. I don't know of my own knowledge. I don't recognize 200-odd signatures. I could positively say that that is the signature of George Birdsall, because I was sworn as an election officer to see that the election was carried out properly. I am not a handwriting expert. I saw him sign on that line because I was in the booth at the time Mr. Birdsall signed. I have been there when he voted, the last two elections, 1924 and 1925. I

(Testimony of Charles A. Sankey, Jr.)
am sure that he did not sign at any other place on this roster of voters, because our roster checked up with our precinct register. [210]

TESTIMONY OF LEONARD H. BREIDENSTEIN, FOR THE GOVERNMENT.

LEONARD H. BREIDENSTEIN, a witness called for the United States, and sworn, testified as follows:

Direct Examination.

(By Mr. BONSALL.)

I am a soap-maker by occupation. I have served on election boards in the City and County of San Francisco, in the capacity of inspector. I think it is the 33d and the 61st precinct. I guess I served in precinct 54, District 31. They change them every year. I have been living out there about ten years. I have seen before Government Exhibit No. 27 for Identification that I am now being shown. I saw that at the election booth. I was on duty at the election booth in City and County of San Francisco on November 3, 1925. On line 162 the name of Joseph E. Marron, 2031 Steiner Street—that man voted at that election. I won't say for sure that he voted on a registration that had previously been made. The clerks check up on that. They are supposed to be checked in my presence. As inspector of elections it is my duty to see that they did check. I have been an inspector of elections there; the clerks do the checking. I might not have been

(Testimony of Leonard H. Breidenstein.)

there at that time; I told them to check. I might have been out to lunch. The book was kept in due course at the election.

EXCEPTION No. 94.

Mr. BONSALL.—We offer this in evidence under this theory, that it was a registration, and that it was acted on.

Mr. SMITH.—Objected to as immaterial, irrelevant and incompetent, and no foundation laid for its introduction.

The COURT.—Objection overruled.

Mr. SMITH.—Exception. [211]

TESTIMONY OF E. O. HEINRICH, FOR THE GOVERNMENT.

E. O. HEINRICH, a witness called for the United States, and sworn, testified as follows:

Direct Examination.

(By Mr. BONSALL.)

I am an examiner of suspected and disputed handwriting, practicing as a legal chemist and microscopist. My office is in San Francisco, 24 California Street. My residence and laboratory is in Berkeley. I am a graduate of the University of California, of the Department of Chemistry, and, as my professional practice and training have developed, I have specialized from the chemical field into the application of the resources of the chemical and physical laboratory, to the investiga-

(Testimony of E. O. Heinrich.)

tion of problems that arise in identification in the courts.

I was first called into this case by Mr. Oftedal of the Intelligence Unit of the Customs Department. I have been practicing my profession sixteen years as a consultant, on the examination of suspected and disputed handwriting, and as a student on the subject about twice that length of time. I have attended in the Federal courts in Oregon, Washington, and California; United States Army courts for the Western Department; State courts in all of the Western states of the Pacific Division, west of Denver, except Wyoming and New Mexico.

I have seen before Government Exhibit No. 1 in evidence. I have seen before Government Exhibit No. 19 in evidence.

EXCEPTION No. 95.

Q. I show you Government Exhibit No. 17 and ask you if you have ever seen that before?

Mr. SMITH.—Just a second. So as to save the necessity of constantly interrupting the orderly process of the taking of this [212] testimony, may our objections that heretofore have been interposed with respect to all the papers, documents, and memoranda seized on the 2d day of October, at 1249 Polk Street be considered as having been re-made at this time to this testimony?

The COURT.—Yes, Mr. Smith. Objection overruled.

Mr. SMITH.—Exception.

(Testimony of E. O. Heinrich.)

WITNESS.—(Continuing.) I have seen before Government Exhibit No. 18 in evidence. I have seen before Government Exhibit No. 8 in evidence, containing 5 slips of paper with longhand writing on them. I have made an examination of all these exhibits. I prepared for them illustrations in connection with them.

These documents that I am now being shown are the papers I prepared. They are all exemplars prepared from the exhibits I have been shown. They are enlargements of portions of the exhibits which have been shown me heretofore. They are photographic enlargements, all taken from the exhibits I have been shown. From the examination of all the exhibits that I have been shown, I have come to a conclusion as to who wrote the writing that is covered in Government's Exhibit No. 1 in evidence from page 34 on. [213]

Q. What is that conclusion?

A. Most of the entries in that book, beginning with page 34, and excepting the entries which appear as footings of columns and check marks having the general appearance of audit marks, were written by the writer who has prepared Government's Exhibit No. 19 and Government's Exhibit No. 17—that is, the signature writing "Joseph E. Marron, 2031 Steiner Street" appearing on Government's Exhibit No. 17; and on Government's Exhibit No. 19 by the same writer who has filled in the body of the instrument and signed that instrument "Joseph Edmond Marron," and excluding

(Testimony of E. O. Heinrich.)

the writing on the last two lines reading "the 12th day of July, 1916, Charles S. Dolman"—I am not certain of that reading, but it is a notary's name.

Q. From the exhibits that I have shown you, I ask you have you arrived at any opinion as to who wrote on the slips of paper contained in Government's Exhibit 8? A. Yes.

Q. In whose handwriting did you conclude those slips were?

A. They are in the handwriting of the same writer who has signed the name and written the address on Government's Exhibit No. 18 which reads "George L. Birdsall, 519 Belvedere Street."

The COURT.—Those slips of paper were the slips of paper taken out of the gray ledger, Exhibit No. 1?

Mr. BONSALL.—Taken from the cash register, your Honor, on the day of the raid.

Q. Professor, will you explain, using your photographic illustration, how you arrived at those conclusions—and will you put them on the blackboard?

A. I have placed on the board, at the left end, two photographic enlargements taken from pages at random in Government's Exhibit No. 1; one shows page 42 of this exhibit, and the other shows page 80 of this exhibit.

EXCEPTION No. 96.

Mr. BONSALL.—I ask that these two photographic pages be [214] offered in evidence at this time.

(Testimony of E. O. Heinrich.)

Mr. SMITH.—I make the usual objection which has been heretofore made to all of the documents that have been introduced.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

(Thereupon the two pages were here introduced in evidence, as United States Exhibit No. 28.)

Said exhibit was and is in the following words and figures, to wit:

(Here insert exhibit.)

A. (Continuing.) My testimony has been that beginning with page 34 and running through the rest of the book, that the writing contained in the columns and the quantity numbers, and the amounts set opposite certain entries, and most of the dates, are all in the handwriting of the writer who has signed "Joseph E. Marron, 2031 Steiner Street" on Government's Exhibit No. 17. I have excepted such items as check marks placed opposite certain entries, and certain footings which appear at the bottoms of some of these columns, and which are in another handwriting.

My first attention to this exhibit was to observe the general style of the writing and compare the different pages with each other, independently of whose hand they were written in. In so doing, I have brought this specimen here to show that the writing, as a whole, viewed from the standpoint of its pictorial appearance, is written in a well-defined cramped style; that the letters are small and so constructed that they occupy individual areas which

(Testimony of E. O. Heinrich.)

are square rather than rectangular, the point being that the writer has so shortened his letters with respect to their width that the entire writing has the appearance of blockiness as compared with a more narrow and angular appearance of the proportions proper to this style of writing. The numbers in these columns range all the way through the digits from 1 to zero, and give us [215] exemplars of the writing, and are in agreement from page to page as we move along through the book.

Each one of the pages, beginning with page 34, has 90 per cent or more of the entries thereon written in this particular cramped style of handwriting.

In undertaking to develop the identifying characteristics of that handwriting, I started with page 82 of this book. In the upper corner of that page there are two entries reading "Personal Ed." And the other immediately below it reading "I. O. U." That particular group of entries at the head of page 82 is the one which I am now putting on the board.

Q. This was made by you, was it, photographed from the book, Government's Exhibit No. 1 in evidence? A. It was, yes.

EXCEPTION No. 97.

Mr. BONSALL.—I now offer in evidence the photographic reproduction of page 82 of Government's Exhibit No. 1 in evidence.

Mr. SMITH.—The usual objection will be interposed and be considered as having been made at this time.

(Testimony of E. O. Heinrich.)

The COURT.—Very well. Objection overruled and exception noted.

(Thereupon the sheet was here introduced in evidence, as United States Exhibit No. 29.)

Said exhibit was and is in the following words and figures, to wit:

(Here insert exhibit.)

A. (Continuing.) In studying the words "Personal Ed." and the *the* group "I. O. U." I find, examining the oval movements of this writer, that he has used regularly a finger movement in writing, and in so doing points arise at certain positions of the group where he transfers the impulse from the finger to the thumb, and *vice versa,* and that they do not co-ordinate properly, and he inserts in the writing a personal characteristic. In the clockwise [216] movement, in the word "personal," we see in the buckle of the "P" in the position of what would be 1 to 2 o'clock if that were regarded as a clock face, a peculiar flattening of the line. That is the effect of inco-ordination of the finger and thumb in transferring the impulse from the thumb to the finger in a clockwise movement. That particular defect frequently occurs in this writing. In making the same form of movement in making the capital "L" in the upper right-hand section of the top of that letter we find that same identifying characteristic, showing that the person who wrote the word "personal" also wrote the capital "I" in the following entry. We have here in each case the beginnings of lines written by one and the same

(Testimony of E. O. Heinrich.)

person. Following that, the quality of the line from the buckle of the "P" through the word "Personal" and closing with the word "Ed." and also following that the quality of the line through the units "I. O. U." we have the same concordance as to quality and maintenance of movement running through those words that we find in turning the oval of the "I" and the buckle of the "P." That identity of writer as between those two entries gives us a group of forms for purposes of comparison with other pages and other writing in the book. I notice that in writing the "I. O. U." that the "O" has a deformation which gives it somewhat the appearance of the digit "6." Going across the same page to the other column, this book being ruled in two columns, I have brought to this exhibit the words "Money out." In the word "out" we find the same forms of capital "O" that we find in the "I. O. U."; also we find in the word "Money" the same manner of forming the "O" and connecting it with the "n"; also the same manner of collapsing the "e" that we have in "Personal," establishing enough data, in my experience, to show that these words "Money out" was written by the same person who wrote "Personal Ed." We have picked up here a personally developed manner of [217] forming the letter "y" in which the loop is enlarged more than its customary width, and is in keeping with the squareness of the small letters which I have heretofore mentioned. We have again the capital "M" and the peculiar cross-terminal

(Testimony of E. O. Heinrich.)

"t." These three entries I united "Money out," "Windler check," and "Argyle"—they are united with each other by the quality of the line and the character of the letters "e" and "m," and the loops in the word "Argyle" below the line in the "g" and "y," and again the proportions of the small letters. In the words "Personal Ed.," we have a terminal shown in the "l" and "d" which forms an identifying feature of this writing; the writing being a finger, the terminals, as a rule, show a marked pressure feature in their formation. That is shown on the turn of the "l" in "Personal," in the "E" in "Ed," in the "e" in "Argyle," the terminal of the "y" in "Money," and the terminal of the "t" in the word "out."

In the exhibit which I have placed on the left-hand side, here, the same pressure movement is shown in the "b" in the word "Club" in the closing stroke; in the closing movement in the crossing of the "t" in the word "set"; and again immediately below in the terminal of the letter "b" in "beer"; the "t" in "set" and the "b" in "club." That pressure movement is characteristic of all this writing.

Q. What did you take this from?

A. That is from one of the pages in Government Exhibit No. 1.

Q. And it was made by you? A. Yes.

EXCEPTION No. 98.

Mr. BONSALL.—I will offer this in evidence.

(Testimony of E. O. Heinrich.)

Mr. SMITH.—Subject to the same objection heretofore interposed.

The COURT.—Objection overruled. [218]

Mr. SMITH.—Exception.

(Thereupon the sheet was here introduced in evidence, as United States Exhibit No. 30.)

Said exhibit was and is in the following words and figures, to wit:

(Here insert exhibit.)

A. (Continuing.) From another page in the book, continuing with the identification of the writing by means of the letters and passing from the word "Argyle" to the word "Yeager," heading the entries on the next group taken, and comparing the terminal of the "g" with the terminal of the "y" in "Money" and noting again the quality of the writing, the collapsed "e," in the abbreviation "Aug." and the word "Kent" the character of the loop of the "g" and the peculiar "t" crossing shown in the word "out" we come to the word "Joseph."

This word "Joseph," forms one of the group of entries on the section here brought to this illustration, and by its quality, and by the formation of the letter "p" by the manner of collapsing the small letter "e," the proportion of the small letters, the height to the width is in perfect harmony with all of the writing here presented as a specimen of what occurs on all of the pages of the book.

Q. What is this a photograph of, Professor?

A. The signatures which appear on Government Exhibit No. 19.

(Testimony of E. O. Heinrich.)

Q. Made by you from that?

A. Yes; and also Government's Exhibit No. 17.

The COURT.—What are Exhibits 19 and 17?

Mr. BONSALL.—Government's Exhibit 17 is the affidavit of registration of Joseph E. Marron, 2031 Steiner Street; Exhibit 19 is the affidavit of candidate Joseph Edmond Marron, filed with the Secretary of State, and subscribed July 12, 1916.

A. (Continuing.) These signatures appearing on these exhibits contain the same grouping in the name "Joseph" as we find in the [219] name "Joseph" taken from Government's Exhibit No. 1. As we compare these signatures, or this entry with these signatures, we have, letter for letter, and by groups as a whole, the same identities in formation, proportions, pressure effect and form that we have in the writing in the book. The "J" shows the same manner of forming the upper oval with the tendency to point it that is shown in the exemplar writing. The lower oval, as compared with the upper oval, is much enlarged. It is connected here to the "o" which follows it; there is no break in the connection with the "s" which follows the "o"; the terminal of the "s" is hooked under in a well-rounded way; the "e" following the "s" in "Joseph" in one instance of the exemplar is collapsed as it is in the writing in the book, Government's Exhibit No. 1—more carefully written in the more formal document, Government's Exhibit No. 19. The "p" follows the same manner of formation, and especially with respect to the lower loop

(Testimony of E. O. Heinrich.)

and the formation of the buckle, and has the same feature that we find in the word "Personal" in the pen writing with the inco-ordination shown in the upper right-hand section of the oval that we show in the pencil writing in the word "Personal." In the "h" we have the feature in Government's Exhibit No. 19 of the collapsed loop, as we have it in the specimen from Government's Exhibit 1, the "h" being more carefully formed in Government's Exhibit 17, but we return to the pressure effect at the terminal of the letter that I have spoken about in connection with the other writing.

The COURT.—We will take a recess now until two o'clock.

(A recess was here taken until two P. M.) [220]

AFTERNOON SESSION.

Mr. BONSALL.—Before proceeding further, if the Court please, there has been some testimony that was introduced in this case, and while I feel it is entirely in order, I am going to ask to strike it out. I make a motion to strike out all testimony as to entries on the first 33 pages of Government's Exhibit No. 1, made by Walter Brand, or at his direction. That is the first motion. The second motion is, I move to strike out all testimony as to sales of liquor at 1249 Polk Street in the City and County of San Francisco, State of California, made by Walter Brand, at times when the defendant Marron was not present. As to those sales that

were made when Marron was present, I ask that that testimony stand.

Mr. SMITH.—So that the Court may understand the position of the defendant Marron, of course we have resisted, as the Court well knows, all of the testimony that the District Attorney is now seeking to strike out. While, of course, we are helpless here at this time to resist a motion of this sort, nevertheless it seems to me the testimony never should have been introduced in the first place. This jury should never have been given that information to begin with, because, as was pointed out time and time again by the judges sitting on the Supreme bench of the State of California, the human mind is a peculiar machine; you can give it impressions and then if you try to take those impressions away they never can be successfully eradicated, they never can be completely taken out.

The COURT.—We have a very intelligent jury here. Don't worry about that. The motion is granted. The jury is instructed to disregard the evidence stricken out. In my final instructions to them I will further instruct them on that point. [221]

Mr. SMITH.—So that the record may show the position taken by the defendant Marron, I at this time ask the Court to act upon a motion that I now make, to call the present proceeding a mistrial and to grant the defendant, Marron, a new trial forthwith, because of the reception of prejudicial matter.

(Testimony of E. O. Heinrich.)

The COURT.—If that is a motion, it is denied.

Mr. SMITH.—Exception.

Mr. E. O. HEINRICH, direct examination (resumed).

EXCEPTION No. 99.

Mr. BONSALL.—I believe I neglected to offer in evidence this exhibit of this handwriting. I offer it as Government's Exhibit next in order.

The COURT.—What is it?

Mr. BONSALL.—It is the photograph of signatures.

The COURT.—Very well, it is admitted. It will be subject to the same objection, Mr. Smith?

Mr. SMITH.—Yes, your Honor. Our objection, I take it is running to all of these photographs or enlargements made of Plaintiff's Exhibit No. 1.

The COURT.—Very well. The objection is overruled and an exception noted.

(Thereupon the sheet was here introduced in evidence, as United States Exhibit No. 31.)

Said exhibit was and is in the following words and figures, to wit:

(Here insert exhibit.)

A. (Continuing.) At the close of the morning session, I had completed comparison of the word "Joseph" as we found it here in the exemplars with Government's Exhibit 17 and 19. The "E" of the initial "Joseph E. Marron" I have compared with the [222] "Es" from the specimen of writing "Personal Ed." on page 82. There we find the

(Testimony of E. O. Heinrich.)

formation considered by sections, the upper oval as compared with the lower oval proportionately, and from the standpoint of movement and curvature, they being the same as those found in the "E" of the signature on Government's Exhibit 19.

In passing to the name "Marron" from the exemplars, we find in the signature the capital "M" of "Marron" having identical features with the "M" as we find it in "Money," where the "M" was capitalized in connection with the expression "Money out" on page 82 of the book.

Going to the terminal, I have called attention heretofore to these unusual pressures on the terminals, and on the address of Government's Exhibit 17; in the word "Steiner" we have that terminal pressure which I have heretofore referred to very well defined. That identifying mark appears throughout the writing from another section taken, I believe, from page 91 or page 94. The word "beer" for example, is the same type of terminal pressure. Again, in a similar word, we have the same rise and maximum pressure. Again, on all terminals on that page we have that distinctive pressure, excessive pressure, at the end of the stroke. And on the horizontal terminals, and on the terminals which are moving in an upward direction we have the same thing.

In connection with the group "Steiner" we have that duplicated throughout the book in the word "Stock." The example is shown here. The culmination of the "S" and "t," the "t" being as high

(Testimony of E. O. Heinrich.)

as the "S" and "t" crossing running into the capital "S" at the beginning of the stroke. This formation appears more than once in the book on those pages where the word "Stock" appears. The "S" is typical as a capital. [223] In connection with the use of the capital followed by "t" or "d," I find regularly througout this writing that the "t" and "d" is as high as the capital. You see it in "Personal Ed," where the "d," which should be less in height than the capital, is fully as high. In the word "out" it is as high as the preceding capital. In the "t" in "State of California" we find the same feature, the "t" being carried up to the height of the capital.

The numbers "2031," appearing in the address 2031 Steiner Street, wherever we find figures which are in complete harmony with the majority of the writing on the page, we find this same feature, the same kind of "2" with the shortened height and the extra wide base. The "3" is proportionately identical, and having the lower oval proportionately larger than the upper oval. The "1" made as a rather shortened stroke, having the same feature of vertical shortness that these small letters carry in the writing.

It was upon these grounds, taken together and considered together, that I came to the conclusion that I have expressed, that the same writer who wrote these signatures on Government's Exhibits 17 and 19, Joseph Edmond Marron and Joseph E.

(Testimony of E. O. Heinrich.)

Marron, and the address 2031 Steiner Street, was the person who has written this book, Government's Exhibit No. 1 in evidence.

Now, if I may turn the blackboard around, I would like to discuss some of the other exhibits, particularly Government's Exhibit "B."

Q. You photographed these yourself, did you, Professor? A. Yes, sir.

Q. From exemplars in Government's Exhibit No. 1 in evidence? A. Yes, sir.

EXCEPTION No. 100.

Mr. BONSALL.—I will make a formal offer of these exemplars. [224]

Mr. SMITH.—Subject to the usual objection, may it please the Court?

The COURT.—Yes. The objection is overruled.

Mr. SMITH.—Exception.

(Thereupon the document was here introduced in evidence, as United States Exhibit No. 32.)

Said exhibit was and is in the following words and figures, to wit:

(Here insert exhibit.)

A. (Continuing.) Government's Exhibit No. 8 consists of five slips of paper, each bearing a memorandum and appearing as I have enlarged them on the photographic enlargements which I have placed on the right end of the board. The first one is dated September 28th. The second one is an item bearing the words "Slot machine." The third bears the date of September 21. The fourth bears

(Testimony of E. O. Heinrich.)

the date September 8. The fifth bears the date September 18.

Mr. SMITH.—So that the record might be complete your Honor, may the record show that objection is made to all of this testimony with respect to the next exhibit, upon all of the grounds heretofore urged with respect to documents that were seized.

Mr. BONSALL.—I have not introduced these as yet, but I will do so. First, I will ask this question:

Q. Did you make the photographs of the exhibits yourself, Professor? A. Yes, sir.

EXCEPTION No. 101.

Mr. BONSALL.—I offer these three exemplars in evidence.

The COURT.—Subject to the same objection, Mr. Smith; and the objection is overruled and an exception noted.

Mr. SMITH.—Thank you, your Honor.

(Thereupon the documents were here introduced in evidence, as United States Exhibits Nos. 33, 34, and 35, respectively.) [225]

Said exhibits were and are in the following words and figures, to wit:

(Here insert exhibits.)

A. (Continuing.) The appearance of the words "Slot machine" on one of these slips gives us a *word from* time to time appears in the book Government's Exhibit 1. The comparison of these two words, as far as this particular slip of Government's

(Testimony of E. O. Heinrich.)

Exhibit 8 is concerned, gives the differentiation, in my opinion, as between the writing of the slip and the writing of the book. In the exhibit, which I have on the lower end of the board, the words "Slot machine" appears as they appear in the book. Just above it is the word "Slot machine" enlarged to the same proportionate size, that is, enlarged to the same degree as it is taken from the slip which is a part of Government's Exhibit 8. They differ, first, in the size of the writing, the writing in the book being much smaller than the writing on the slips. The comparison of that size is actually shown by the difference in the size in these two words as they appear on the enlargement. The writing on the slips is nearly twice as large in its natural size as the writing in the book. The word from Government's Exhibit No. 8 is taken with a different type of "S." The writer in Government's Exhibit No. 1 uses the capital form throughout the book. Occasionally the lower case form will come in, but the capital form has the preference. On all of these words, "Slot machine" where appearing in the book it has the capital form as opposed to the lower case form as shown in Government's Exhibit No. 8. The writing in Government's Exhibit 1 shows the "l" connected with the "o" as opposed to a break in that position in the writing in Government Exhibit 8. The same is true from the movement "o" to "t." The terminal of the "t" in Government's Exhibit 8 in the word "slot" is an entirely different order from that shown in [226] Government's

(Testimony of E. O. Heinrich.)

Exhibit 1. In Government's Exhibit 1 we have the decided terminal pressure at the end of the stroke that I have heretofore mentioned. As far as the "t" goes, the terminal ends on the base line in a downward direction, just as we find with the "d" as well as the "t," especially where the "t" was not crossed with a triangular cross shown in some specimens of the writing from Government's Exhibit No. 1. In this word "Slot" we have, as it appears in Government Exhibit 8, a hook terminal which is an entirely different character. In the word "machine" as taken from Government's Exhibit 8, there appears to be a club terminal. That terminal is one which has no pressure effect in it, and is a terminal width only as compared with the writing in Government's Exhibit 1. The word "Slot machine" as it is taken from Government's Exhibit 8 has been written with a pencil whose point was sharpened something like a carpenter's pencil, it was wider along one axis than the other at right angles to it. That has produced this peculiar effect in the "e" here, of a narrow stroke on the downward movement of the pencil just at the turn into the next connecting stroke, and has produced a wide stroke on the terminal, having somewhat the character of a pressure effect that we see in "Slot machine sales," and the other items in Government's Exhibit No. 1. In the "M" in "Machine" and the "M" in Marron, taken from this exhibit, Government's Exhibit 8, we have an entirely different form of letter as compared with the words

(Testimony of E. O. Heinrich.)

"Marron" and "Money" shown on the previous exhibits. As we have here in the words "Machine," the writer of Government's Exhibit No. 1 initiates the capital "M" with a high leading stroke, not originating on the base line, and has the second and third shoulders of that letter lower than the first shoulder of that letter. In the "M" of the writer appearing in Government's Exhibit 8 we have the capital "M" initialed [227] on the right side of the letter, with the return movement to an oval formation, as the initial shoulder of the "M" and the second and third shoulders following along at the same level, with the third shoulder pointed, as compared with the rounded form of the first and second. The following letter, the "a" in each case is disconnected from the capital "M" as compared with the connection shown by the writer on Government's Exhibit 1. The "h" in machine is disconnected in Government Exhibit 8 as compared with the connection in Government's Exhibit 1. The "e" in "machine" in Government's Exhibit 1 has the customary abrupt terminal, as compared with the extended terminal in Government's Exhibit 8. If we compare the writing of these tags, and particularly this exhibit that I have here, we find this writer of the tag in Government's Exhibit 8 writes several letters at a time, that is, he has a limited position, that is, he lifts the writing instrument from the paper and acquires a fresh permission for writing, which permits the writing of two or three letters at a time. In the word "Mar-

(Testimony of E. O. Heinrich.)

ron" we have three letters shown as written together before the next break comes. In the word "Slot" we have three groups, "Sl," "o," and "t," the letters being broken between the "l" and the "o" and "o" and the "t." In the word "Machine" we have the group of three letters "ach," and the second group of three letters "ine"; that is, the writer of this tag has definite limitations in his writing, which permits him to write three or four letters at a time, and then he shifts to a new position, which introduces into his writing a break which we call a pen or a pencil lift.

On the basis of this comparison, I find that the writer of this tag is not the same writer as the writer who has written up the book, and whom I have described as Marron. These tags, however, all belong to each other, and are produced [228] by the same writer. I have already described the writing "Slot machine," and the peculiar formation of the terminal "t." That same formation of the terminal "t" in the "Slot Machine" is repeated in the abbreviations of September, appearing on these slips, which are dated September, and to which I am pointing. That is, each of the other slips of the five has the date September in it abbreviated "Sept.," and each case we have the same formation of the terminal stroke, and a similar character of crossing stroke, that we find in the word "Slot."

We have also the same manner of beginning the group with the "S" having its initial stroke well

(Testimony of E. O. Heinrich.)

below the base line and appearing as a slightly enlarged form of the lower case letter.

These four groups, "Sept." appearing on each of the four slips identify these four as being written by the same person, and also as being written by the same person who wrote the slip bearing the words "Slot Machine." Each of these slips has certain capitals. Four of them have the capital "B." Two of them have the word "Birdsall." In examining Government Exhibit 18 we have there the signature "George L. Birdsall" and the numbers "519 Belvedere Street." I have photographed that in juxtaposition with these slips. That signature as appears on Government's Exhibit 18 is at the bottom of Government's Exhibit 33. An examination of the capital "B" on the several slips on which that appears shows the manner in which the letter is finished, and particularly the manner in which it is initiated at or under the stroke on the right side. It shows that they were all written by the same person. But two of these specimens of the capital "B" occur in the word "Birdsall." For purposes of more ready comparison, I have eliminated three of the slips from the exhibit and have another exhibit here bearing only the [229] word "Birdsall," as compared with the signature "George Leo Birdsall, 519 Belvedere Street," as it occurs on Government's Exhibit 18. If we compare, first, the abbreviation "St" with the group appearing in "Sept" we find the same terminal feature on the "t," the same low-placed crossing,

(Testimony of E. O. Heinrich.)

and the lack of an upstroke on that letter, that is to say, there is a break or disconnection in front of the "t" which eliminates the formation of an upstroke. The capital "B" in "Belvedere" and in "Birdsall," with the letter started just underneath the buckle in the right side is of the same identical character as we have in the word "Birdsall" on the slips. Running on through, we find, first, in the slips from Government's Exhibit 8 that "Bir" is written in one group of three letters, with the "r" having the shoulders deformed in such a way that except by context you cannot distinguish it from an "i"; and the letters "ir" in "Bir," you cannot, except by context, distinguish from an "u." That same feature we find in Government's Exhibit 18, including the malformation of the "i" and the "r" and the break in front of the "d." In continuing, the writer in the sales slips has written the next group "ds." In the exemplar we have the same feature "ds" being written as one group; the succeeding position for writing has included the remaining three letters "all" as the succeeding group. The manner of initiating the "a" as well as the "g" in "George"—the "a" in "Birdsall" and the "g" in "George" shows the feature in which the "a" is initiated well over to the right, and the leaving on the letter an overhanging cap, after the manner shown in the figure I have just drawn on the board. This is in the exemplars, and is in the first of the tickets, the one dated September 8. It is formed in an identical way. Since none of these writings

(Testimony of E. O. Heinrich.)

I find is disguised, and we are dealing here only with the regular writing habits of the writer, I have deemed these few points, together [230] with the complete harmony in pictorial appearance and the quality of the written line, and the general proportions of the writing of the small letters as compared with the capitals, to be sufficient to identify the writer "Birdsall" as the person who has written these sales tags, and to differentiate him from the person who has written the book.

Q. Now, I call your attention to Government Exhibit No. 1, page 69. You will see on that page a word beginning with a "P," the word "Police" or "Policy." Did you make an examination of that, Professor? A. Yes, sir.

Q. Has that word been changed from the manner in which it was originally written? A. Yes, sir.

Q. How would you say that was originally written?

A. It was originally written "New Police"; it now reads "New Policy."

Q. Will you state to the Court and jury how you arrive at the conclusion that that has been changed?

A. I examined it microscopically. The additional stroke changing the "e" to a "y" is very readily seen under the magnification of 20 diameters. It is very apparent.

Q. I ask you to turn to page 69 of Exhibit 1. What is that page?

A. It is a memorandum of transactions similar to those we have been discussing.

(Testimony of E. O. Heinrich.)

Q. Is the month of March mentioned there?

A. Yes.

Q. In whose handwriting is that? A. Marron.

Q. You base that on these different exemplars you have testified to? A. Yes.

Q. I call your attention to page 81,—

A. Pardon me, did your question go just to the word 'March" or to the whole page?

Q. If there is any difference on the page I would like to know it? We will take the whole page.

A. There is a column [231] of figures here—footings—which are not Marron's, but are in the handwriting of some other person who appears regularly throughout here.

Q. Ninety per cent of those figures are in whose handwriting? A. Marron's.

Q. Now, turn to page 81 of Government's Exhibit 1: Does the word "May" appear on that page? A. Yes, three times.

Q. What is that page? A. Page 81.

Q. What does that refer to?

A. It is a record of transactions of the same character that I have heretofore photographically illustrated on the board.

Q. In your opinion, in whose handwriting are most of those items? A. The writer Marron.

Q. Now turn to page 87.

A. Just a moment: That answer refers to all but the footings and the auditor's checks—the original entries covering expenses and other trans-

(Testimony of E. O. Heinrich.)

actions are in the handwriting of Marron. Now, what was the page you just asked me to turn to?

Q. Page 87. What does that page deal with?

A. That is a record of transactions similar to those I have illustrated on the board.

Q. In whose handwriting are the majority of those entries, in your opinion?

A. The original entries are Marron. Some recapitulation here is in the handwriting of the auditor.

Q. The recapitulation is not in Marron's handwriting? A. No.

Q. I call your attention to page 101 of Exhibit No. 1. What does that page deal with?

A. That is a balance.

Q. In whose handwriting are most of those entries, in your opinion?

A. In the handwriting of the auditor. There is none of it Marron's handwriting on that page.

Q. Now, turn to page 107. Any of Marron's handwriting there? [232]

A. Two words only at the top of the page.

Q. What are those words?

A. "September" and "Chang."

Q. You went through that ledger from page 34 to the close? A. Yes.

Q. What proportion of the total entries would you say were in the handwriting of Marron?

A. About 90 per cent.

Mr. BONSALL.—Take the witness.

(Testimony of E. O. Heinrich.)

Cross-examination.

(By Mr. SMITH.)

I am not a paid employee of the Government. I have been employed by the Government, but I am not a paid employee of the Government. I am being paid for professional services by the Government. I am not an employee of the Government. I am an independent practitioner.

This makes the fourth day that I have actually spent on the exhibits that I have testified to concerning certain writings to-day. This trial has been set for previous dates, and I have had some discussion with one of the United States Attorneys heretofore, on one or two days, and there has been some other disturbance of my calendar. So far as reviewing the case is concerned, I reviewed it once in the laboratory for several hours. No one was with me on that occasion. I went there alone. I went over the testimony I had given at the former trial. I had that typed, and then I read it over in the laboratory. I read it completely once about four weeks ago, and this morning I think I looked it over for about half an hour. I compared these enlargements at my own instigation. That is, the case was entrusted to me for examination and the rendering of an opinion. After having rendered an opinion, I was instructed to prepare for trial to illustrate my opinion in whatever manner I professionally saw fit. The selection of the data was entirely my own [233] selection. As I remember

(Testimony of E. O. Heinrich.)

it, it was about a week after this matter was submitted to me that I rendered an opinion. My first work on it was to photograph the document which is Government's Exhibit 1. After I had made photographs of quite a large number of the pages—I think all of the pages that have any writing on, and had made prints of those photographs, then first I had an examination to study the writing, and by the time I got through with it, about a week elapsed. I could not tell you how much time I actually spent in the preparation of these exhibits in the former trial, without consulting my record. I rendered the Government a bill for my services in the former trial. I don't remember how much. I haven't any idea—it was probably about $350 or $400. That $400 is an extravagant estimate. I may have been paid as much as that on this case, but I am confused in my recollection with another case which was tried at about the same time, known as "United States vs. The 'Quadra."

This case is not entirely clear in my mind. My memory telescopes on those matters. I turn my accounts over to my Secretary, and that is the last I think of them. In the "Quadra" case I had exhibits such as have been produced here. I had books. The books in the "Quadra" case were not as big as the gray ledger. It was the supercargo's log. It was a different kind of book: It was a dairy. I do not recall any slips of paper similar to this Exhibit No. 8. It may be thue that the handwriting matters that were involved in the

(Testimony of E. O. Heinrich.)

"Quadra" case were entirely different from the handwriting that is involved here, but I am being asked about money transactions, and not about handwriting. I am like a lawyer in that respect; when once a case is finished I put it aside and forget about it. That is all there is to it. I may have received $400 for the work I did in connection with [234] this matter in the former trial. I don't remember exactly about it. That was not a matter of concern to me, not beyond seeing that it is collected. After the amount is earned and charged, then attention is given with due diligence to the collection of it, and after that is over, it is all finished.

My work for the Government is on a per diem basis. I charged $25.00 a day for each day I spent in the preparation of this sort of work, and testifying in court. I have four days charged up on this case. It covers the first consultations and other matters appearing in the case. As far as sitting down and actually studying this testimony is concerned, it would be probably one day—copying the record and reading the record of the previous case and digging up my notes and going through them. When it comes to render my bill, I will render a bill for all the time I have put in on this case.

I am a graduate chemist. I do not know that in preparing these various exhibits by the use of chemicals, and by reason of my being an expert in such matters as photography and the handling of

(Testimony of E. O. Heinrich.)

various chemicals, that I can bring these writings out brightly or dimly. I know that the effect of a subject on a photographic plate will vary with the nature of the subject. I could not take the word "Birdsall," for instance, and by the use of a paper and certain chemicals, bring that writing out as heavily as the word "Sept." and the figure "8." I am not that good at it. I could not make it a whole lot heavier than it is here without making the rest of it correspondingly heavier. I could not make it heavier without affecting all the rest of it. If you want to know if I can increase the contrast between the black and white background, I will say no, because that contrast is fixed. I can photographically, by a proper selection of plates, show a higher degree of contrast in the photograph, as [235] far as one object is concerned, than appears to the eye in the original. "Sept. 18," could be blotted out, but not without showing a trace of it. As far as I am concerned, I cannot do that kind of work. I don't know if it could be put back in. All of this exhibit was put in at one time. That is all in one negative. I could not put that in separately if I wanted to, on that negative. The paper can be covered and protected and put in separately, but I cannot do it on the negative. I have not seen figures substituted in ordinary photographs. I am familiar with the method where a certain individual could be taken out of a photograph and another one put in its place, or at least some of the results of trick pho-

(Testimony of E. O. Heinrich.)

tography. I have never myself endeavored to duplicate it.

With respect to page 69 of Government's Exhibit No. 1, I find there has been a change in that word "policy." I could not say whether the change was made by the person who wrote that word, or was made by someone else. It is made with a different pencil. That is about all I can say about it. I could not tell, as an expert, whether it was made by the same hand or not. There is too little of it. There is just a stroke there. I would not venture an opinion. I cannot tell whether that dot appearing over the top of the "y" is a defect in the paper or whether it was a dot that was placed there at the time it was originally written. It is a graphic dot—a pencil dot. I cannot tell by extmination whether it is of the same age as the original writing, not as to the graphite writing. It is true that different persons who are educated in the same schools, and who are taught the same system of handwriting, will write hands that are greatly similar. In my broad experience, I have examined handwriting, or at least have seen handwriting that would be almost impossible to differentiate [236] between. That is particularly true of the writing of young people.

Redirect Examination.

(By Mr. BONSALL.)

All these exemplars that I have made these photographs from are in evidence in this case.

Mr. BONSALL.—The Government rests.

EXCEPTION No. 102.

Mr. SMITH.—The defense at this time makes a motion for a directed verdict. That is predicated on the ground that there has been no case of conspiracy made out as against the defendant, Marron.

The COURT.—Motion denied.

EXCEPTION No. 103.

Mr. SMITH.—Exception. The defense rests, and we renew the motion as just made.

The COURT.—The same ruling.

Mr. SMITH.—Exception. [237]

Thereupon counsel for the Government and counsel for the defendant announced that they had rested their cases.

The above constitutes all the evidence oral and documentary introduced and admitted by the Court on behalf of the United States and on behalf of the defendant.

Thereafter, the case was argued by the attorney for the United States and by the attorneys for the defendant.

Thereupon the Court charged the jury as follows:

CHARGE TO THE JURY.

The COURT.—(Orally.) Gentlemen of the Jury: The indictment in the instant case charges that the defendant Marron and the other named persons, as well as other persons whose names were unknown to the Grand Jury, conspired to commit certain designated public offenses. It is further

charged that to accomplish the object of the specified conspiracy, one or more of the defendants committed one or more overt acts. I charge you that you are not authorized to convict the defendant unless you find from the evidence beyond a reasonable doubt that there was a conspiracy as specified between the defendant and at least one other of the designated persons; and, in addition to that, you should find from the evidence beyond a reasonable doubt that at least one of the designated persons committed at least one of the overt acts alleged in the indictment.

It is apparent to you that the defendant Marron is alone on trial at the present time; the circumstance that none of the other parties are present on trial would not authorize you to acquit the defendant if you find that he did, in fact, conspire with one or more of the persons designated as conspirators in the indictment. Whether the defendant Marron may have been given a separate trial, or whether the cases of the other defendants have been disposed of, or remain yet to be disposed of, is not before you for your consideration. You are concerned here solely with [238] the acts of Marron as far as they have relation to the charge specified in the indictment, and it would be no defense in his favor that you are not also trying at the present time the cases of any of the other alleged conspirators.

The indictment, you are to understand, Gentlemen, is a mere accusation against the defendant,

and is not, of itself, any evidence of the defendant's guilt; and no juror in this case should permit himself to be to any extent influenced against the defendant because of such indictment.

The defendant is presumed to be innocent until the Government has satisfied the minds of the jurors of his guilt beyond a reasonable doubt. The burden to adduce such proof of guilt beyond a reasonable doubt rests upon the Government at all times and throughout the trial of this cause.

The presumption of innocence can only be removed by evidence which satisfies your minds upon every material point to a moral certainty and beyond a reasonable doubt. A moral certainty means that evidence must be presented of a character and to a degree and in quantity which would ordinarily produce conviction in an unprejudiced mind.

A reasonable doubt means exactly what the term "reasonable doubt" implies; that is to say, it is the kind of a doubt which would influence you in the most important affairs of your own lives.

The defendant Marron is charged with a conspiracy. He is charged with having entered into a combination, confederation, or conspiracy with others named and unnamed to bring about a violation of the so-called National Prohibition Act; but mark this, Gentlemen, he is not charged with a violation of the National Prohibition Act, and however much you may be convinced from the evidence that he may have violated the National Prohibition Law, he is not to be convicted on that, be-

cause he is [239] not on trial for that, but for a conspiracy.

The law regards the act of unlawful combination and confederacy as dangerous to the peace of society, and declares that such combination and confederacy of two or more persons to commit crime requires an additional restraint to those provided for the commission of crime, and makes criminal the conspiracy, with penalties and punishment distinct from those prescribed for the crime which may be the object of the conspiracy. You will readily understand why this is true; a conspiracy becomes powerful and effective in the accomplishment of its illegal purpose in proportion to the numbers, power and strength of the combination to effect it. It is also true that it involves a number in a lawless enterprise. It is proportionately demoralizing to the well-being and character of the men engaged in it, and, as a consequence, to the safety of the community in which they belong.

Critical reference has been made by counsel in argument to the effect that it was never the intention of Congress that persons who have violated the National Prohibition Act should be charged under Section 37 of the Criminal Code of the United States, which relates to the offense of conspiracy. Gentlemen, you and I are bound to find the intention of Congress from its enactment and not from the argument of counsel, or what one person may think about it.

Some reference has also been made in argument to the National Prohibition Act, and it would seem that the National Prohibition Act is involved in the trial of this cause. With reference to that, I say to you—that is to say, in reference to the National Prohibition Act, I say to you that no matter what your views as citizens may be as to the propriety of the law, the moment you are selected as jurors and thus, with myself, become part of the machinery of the court, it is your plain duty to [240] enforce the law. As citizens, you are at liberty, of course, to take such steps as you may deem advisable to effect an amendment or repeal of the law, but it is clear that in the discharge of your serious duties as jurors, no hostility to the law or its enforcement should be entertained. In short, with the policy of the law you and I have no concern. The law should be enforced. Its enforcement is my duty under my oath; it is your duty under your oath. I shall do my duty, and I am confident that you will do your duty. No feeling for or against this law should be permitted to work any sympathy for or prejudice against the defendant on trial.

The indictment is based on Section 37 of the Criminal Code of the United States, which, for the purposes of this case, provides that "if two or more persons conspire to commit an offense against the United States and one or more of such parties do any act to effect the object of the conspiracy, each of the parties thereto shall be guilty of a crime" and punished accordingly.

You will observe that there are three essential elements necesary to constitute a crime under this statute; first, there must be the act of two or more persons conspiring and confederating together; second, it must appear that the purpose of the conspiracy was to commit an offense against the United States; and, third, one or more of the conspirators after the conspiracy has been formed, must do some act to effect the object thereof. Each of these elements is an essential ingredient of the crime charged.

Now, taking them up in their order: A conspiracy is a combination of two or more persons by concerted action to accomplish a criminal and unlawful purpose, or some purpose not in itself unlawful or criminal by criminal or unlawful means. A common design is the essence of a conspiracy; and it is, therefore, [241] necessary, in order to prove a conspiracy, for the Government to show a combination of two or more persons by concerted action to accomplish a criminal purpose. It is not necessary, however, for the Government to prove that such parties met together and entered into an explicit or formal agreement to that effect, or that they directly, by words or in writing, stated what the unlawful scheme was to be, or the details of the plan or means by which it was to be made effective. A conspiracy may be and usually is shown and proven by circumstances. Persons who- contem plate committing a crime do not ordinarily place their intentions in writing or enter into any formal agreement for that purpose; but their agreement or

understanding is generally to be determined from their acts and conduct and the entire circumstances surrounding their relationship and transactions. Guilty connection with a conspiracy may be established by showing association of the persons accused in and for the purpose of prosecuting the illegal object. It is enough if the minds of the parties meet understandingly so as to bring about an intelligent and deliberate agreement to do the acts and commit the offense charged, although such agreement be not manifested by formal words.

Each party to a conspiracy must be actuated by the intent to promote the common design; but each may perform separate acts or hold distinct relationships in promoting such design. Thus, if two persons pursue by their acts the same object by the same means, one performing one part and the other another part, so as to complete it, with a view to attaining the object they are pursuing, that will be sufficient to constitute a conspiracy. It is enough if two or more persons in any manner or through any contrivance positively or tacitly come to a mutual understanding to accomplish a common unlawful design; in other words, where an unlawful end is sought to be affected, and two or more persons, actuated by a [242] common purpose to accomplish that end, work together in any way in pursuance of the unlawful scheme, every one of such persons becomes a member of the conspiracy, although the part that he was to take was a subordinate one.

Again: One who, after a conspiracy is formed, with knowledge of its existence, joins therein and

aids and participates in its execution, becomes as much a party thereto from that time on as if he had been an original conspirator.

Furthermore, where two or more persons are proven to have combined and confederated together for some illegal purpose, any act done by one of the parties during the pendency of the conspiracy and in furtherance of the common design and in reference to the common object, is, in law, the act of all, and, therefore, proof of such act will be evidence against any of the others who are engaged at that time in the same conspiracy.

It is also true that any declaration of one of the parties in furtherance of the conspiracy or in execution thereof during the pendency thereof is not only evidence against himself but evidence against the other parties then members of the conspiracy, who are as much responsible for such declarations and act to which it relates as if made or committed by them. This rule applies to declarations and acts of a conspirator, although he may not be under prosecution or on trial. His declarations are equally admissible with those of the parties under indictment and being tried. But the declaration of a conspirator not in execution of the common design, or merely narrating past events, is not evidence against any of the parties other than the one making such declaration.

One cannot be made a member of a conspiracy except by his own conscious act, and not by the acts and declarations of another.

The second essential element of a conspiracy, so far as [243] this case is concerned, is that its purpose was to commit an offense against the United States. The law in force at the time of the alleged conspiracy provided, briefly, and so far as it relates to the cause on trial, that it shall be unlawful to purchase, transport, or have possession of intoxicating liquor without a permit; that it shall be unlawful to manufacture or sell the same; that it shall be unlawful to maintain a room, house, building, or place where intoxicating liquor is sold contrary to law; that the keeping of intoxicating liquor for sale is a common nuisance.

The third essential element of the crime charged is that one or more of the conspirators shall after the conspiracy is formed and during its existence do some act to effect the object thereof, and the act of one conspirator for this purpose is, in law, the act of all.

A conspiracy cannot exist without a guilty intent being there present in the minds of the conspirators. Upon the question of intent on the part of the defendant, you are instructed that the law presumes that every person intends the actual and ordinary consequences of his act. Wrongful acts, knowingly or intentionally committed, cannot be justified on the ground of innocent intent. Ordinarily, the intent with which a man does a criminal act is not proclaimed by him; and, ordinarily, there is no direct evidence from which the jury may be satisfied from the declarations of the person, himself, as to what he intended when he did a cer-

tain act. This question of intent, like all other questions of fact, is solely for the jury to determine from the evidence in the case.

Generally, upon this subject of conspiracy, I instruct you that it is competent for you to consider all the facts developed in the case for the purpose of answering the question as to whether or not a conspiracy was, in fact, entered into between the parties [244] named in the indictment, or any of them.

You are the exclusive judges of the credibility of the witnesses and the weight to be given to their testimony. You are not bound to decide in conformity with the declaration of any number of witnesses whose testimony does not produce conviction in your minds against a less number, or a presumption of law, or other evidence satisfying your minds.

You are instructed that a witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, by his motives, or by contradictory evidence. If any witness that has been produced, sworn, and examined in this case has wilfully sworn falsely as to any material matter, you may distrust his entire testimony.

In determining the credibility of a witness, you should consider whether his testimony is, in itself, contradictory; whether it has been contradicted by other credible witnesses; whether his statements are reasonable or unreasonable; whether they are consistent with his other statements, or with the facts established by other evidence, or admitted

facts. You may also consider the witness' manner of testifying under examination, the character of his testimony, the bias or prejudice, if any, manifested by him; his interest or absence of interest in the case; his recollection, whether good or bad, clear or indistinct concerning the facts to which he testifies; his inclination or motive, together with his opportunity for knowing the facts whereof he speaks.

You have had presented to you at this trial the testimony of an expert witness upon the subject of handwriting. You may apply the rule which I have just stated to you to the testimony of such a witness; and, furthermore, in that connection, I say to you that [245] the opinions of experts are not conclusive; their opinions are not to be substituted for the common sense and judgment of the jury. The purpose of the introduction of such evidence is to supplement the general knowledge and experience of the jury in relation to the matters before the jury, and, thereby, to aid the jury in the exercise of its own judgment, to the end that a more just and accurate conclusion may be drawn from the evidence.

The Court deems it proper to admonish you that you are not to consider evidence which has been excluded or ordered stricken out by the Court in determining any fact in the case. If, during the course of the trial, there has been anything said by the Court, either in passing upon any objection or motion, or in ruling upon any question of evidence, or if hereafter, in discussing certain phases of the

evidence and its applicability to the law of this case, I shall say anything about it, I want you to understand that in no manner, shape, or form do I mean to intimate anything, whatsoever, as to the credibility of any witness, or the truth or falsity of anything that has been sworn to. That is for you to determine. I am satisfied that you will give all matters that have been presented to you from the lips of witnesses, and from the documentary evidence, such consideration as the importance of the case to the people of this State and the United States, and to this defendant, seems to warrant.

You are instructed to disregard all testimony as to entries made in Government's Exhibit No. 1, otherwise identified here at the trial as the gray ledger, made by Walter Brand, or under his direction, from page 1 to page 34, both inclusive.

You are further instructed to disregard the evidence of all witnesses as to sales of liquor by Walter Brand to them at 1249 Polk Street, San Francisco, California, except as to such times as the defendant Marron was actually present at such sale. [246]

You will disregard all testimony as to George Hawkins, except in so far as same was communicated by Walter Brand to the defendant, Marron.

You are instructed that the defendant Brand is not a co-conspirator in the present trial.

I instruct you not to consider as an overt act in this case the fact that George Hawkins sold intoxicating liquor at No. 1249 Polk Street, in the City and County of San Francisco in violation of the National Prohibition Act, for the reason that

George Hawkins has not been sufficiently identified in this trial as a co-conspirator.

I instruct you further that you are not to consider as an overt act in this case the fact that Walter Brand sold liquor at 1249 Polk Street in the City and County of San Francisco in September, 1923.

I further instruct you that while the Government charges the inception of this conspiracy, if such you find exists, began in May, 1923, and ended early in October, 1924, yet if the conspiracy is found to exist between the defendant Marron and any other one or more of the conspirators mentioned in the indictment at any time between these two dates, the time of the conspiracy has been sufficiently proven. It is not necessary that the Government prove any dates exactly as alleged in the indictment.

In order to sustain the indictment, it is necessary that the Government prove one or more of the following overt acts charged in the indictment:

(a) That on November 17, 1923, at 1249 Polk Street, former Police Officer Patrick Kissane received the sum of $5 from George Birdsall, *alias* George Howard, for the express purpose of furthering the said conspiracy, and with the intention so to do.

(b) That on March 31, 1924, former Police Sergeant Joseph [247] Gorham received at 1249 Polk Street from George Birdsall, *alias* George Howard, the sum of $90 for the purpose of furthering such conspiracy, and with the intention so to do.

(c) That in November, 1923, George Birdsall,

alias George Howard, sold intoxicating liquor at 1249 Polk Street in furtherance of said conspiracy, and with the intention so to do.

(d) That on May 15, 1924, Joseph E. Marron, *alias* Eddie Marron, maintained a nuisance at 1249 Polk Street by keeping for sale on the premises at 1249 Polk Street intoxicating liquor in violation of the National Prohibition Act, in pursuance of said conspiracy, and with the intention to further the object of the same.

(e) That on May 15, 1924, George Birdsall, *alias* George Howard, maintained a common nuisance at 1249 Polk Street by selling liquor at 1249 Polk Street in violation of the National Prohibition Act, in pursuance of said conspiracy, and with the intention to further the object of the same.

However, if the Government has proven any one of these overt acts alleged in the indictment, they may prove any other overt acts by the conspirators named in the indictment, or with unnamed conspirators, in furtherance of the object of the conspiracy. In this regard, I charge you that if the Government has proven any one of the five overt acts mentioned, you are entitled to consider the testimony of the witness Nielsen, if you believe his testimony to be true, who testified as to making three trips to rum-running ships in the Pacific Ocean at the request of the defendant Marron, upon his order, and receiving three cargoes from the rum ships pursuant to the said orders, of his landing two boatloads of liquor in the City of San Francisco from such rum ships, pursuant to the orders ob-

tained from the defendant Marron; and of his testimony that he was paid $3 per case for liquor so [248] transported from the rum-running vessels at the defendant Marron's request, at 1249 Polk Street, in the City of San Francisco, by the defendant Marron—as to whether or not a conspiracy was established as alleged in the indictment.

Furthermore, if you find that the Government has proven one of the foregoing overt acts mentioned in the indictment, you are entitled to regard each of the entries in Government's Exhibit No. 1 made by the defendant Marron, if you find from the evidence, as a matter of fact, that they were entered by him, to be an overt act in furtherance of the conspiracy alleged in the indictment.

If you find from the evidence that the witness Vaughn prepared a summary of profits and loss at the end of each month at the request of Birdsall and with the knowledge of the defendant Marron from Government's Exhibit No. 1 in evidence, and you also find that the Government has established any one of the foregoing overt acts mentioned in the indictment, you may regard this as evidence tending to establish the conspiracy set forth in the indictment.

If you find from the evidence that the conspiracy is established only between co-conspirator George Birdsall and the defendant Marron, this would be sufficient to convict the defendant Marron, as it is not necessary that the Government connect all of the co-conspirators mentioned in the indictment in connection with the same.

Gentlemen, there has been submitted in this case evidence which, in its legal effect, is sufficient to sustain a verdict of guilty as charged against the defendant Marron on trial, if it convinces you of his guilt beyond a reasonable doubt; but whether it satisfies you to that extent, that is to say, beyond a reasonable doubt, is something solely for your consideration.

In the trial of all indictments, informations, complaints [249] and other proceedings against persons charged with the commission of crimes, offenses and misdemeanors in the United States courts, the person so charged shall, at his own request, but not otherwise, be a competent witness; and his failure to make such request shall not create any presumption against him.

If the Government fails to establish to a moral certainty and beyond a reasonable doubt any one element of the crime with which the defendant is charged, and which it is necessary to establish in order to convict, or if there remains in the minds of the jurors a reasonable doubt as to whether or not the Government has established any element constituting the crime to a moral certainty and beyond a reasonable doubt, then you must find the defendant not guilty. This applies to the jury as a whole, and to each individual juror, and no juror should vote for a verdict of guilty so long as he entertains such reasonable doubt. If the evidence leaves it uncertain which of two or more inferences from the facts proven is the true inference, you must adduce that inference most favorable to the defend-

ant; and if after considering all of the evidence in this case you are able to conscientiously reconcile such evidence upon any reasonable theory consistent with the defendant's innocence, you should do so. Mere probabilities, or suspicions, or surmises are not sufficient to warrant a conviction; nor is it sufficient that the greater weight or preponderance of the evidence supports the allegations of the indictment; nor is it sufficient that upon the doctrine of chances it is more probable that the defendant is guilty than innocent.

Witnesses have been called in the course of the trial who have testified to their own participation in criminal practices. Criticism has been made of their testimony and the weight to which it is entitled. The Court instructs you on this subject that it [250] is the settled rule in this country that even accomplices in the commission of crime are competent witnesses, and that the Government has the right to use them as witnesses. It is the duty of the Court to admit their testimony, and that of the jury to consider it. The testimony of accomplices is, however, always to be received with caution and weighed and scrutinized with great care.

While before you can find the defendant guilty of the charge in the indictment the evidence must satisfy you as to his guilt beyond a reasonable doubt, yet you will not understand from this that the Government is called upon to make a case free from any possible doubt, that is, to prove the defendant's guilt to an unassailable demonstration; such is not the law, for such proof is rarely obtain-

able in dealing with human transactions; in other words, the doubt which will justify your hesitation must be based in reason and arise upon evidence, and not consist of mere fanciful hesitation growing out of your sympathies or based upon something other than a fair and impartial consideration of the evidence in the case.

The term "reasonable doubt" means just what its language imports. To be a reasonable doubt it must be based upon reason. There is hardly anything relating to human affairs that is not open to some possible, or fanciful, or imaginary doubt. Mere possible, or fanciful, or imaginary doubts are not reasonable doubts. A reasonable doubt is that state of the case which after the entire comparison and examination of all the facts and circumstances, leaves the minds of the jurors in that condition that they cannot say that they feel an abiding conviction to a moral certainty of the truth of the charge.

It takes the concurrence of all of you to agree on a verdict, and if you so agree you will have the verdict signed by your foreman and returned into court. [251]

Mr. BONSALL.—Just one correction, if the Court please, and that is regarding the overt act charged against George Birdsall, *alias* George Howard, on May 15, 1924. The Government contends that the overt act was maintaining a common nuisance by keeping liquor for sale—not selling it.

The COURT.—Yes, that is so. I should have stated it in that way if I did not. The attention of

the jury is called to that. The instruction is corrected in that manner.

Mr. WISEMAN.—If the Court please, the defendant Marron respectfully takes exception to the following portions of your Honor's charge:

First, with reference to the portion of your Honor's charge concerning the question of intention, to wit, the portion commencing that the law presumes the natural consequences of a man's wrongful act, and continuing down in that paragraph covering the matter of intention. I assume that will be a sufficient reference to make to it?

The COURT.—Yes.

Mr. WISEMAN.—The defendant Marron likewise desires to except to that portion of your Honor's charge concerning the statements made by Brand and Marron, as having originally emanated from Hawkins. I believe your Honor instructed the jury that the statements of Hawkins, or the acts of Hawkins, would not be binding on the defendant Marron unless they were communicated to him by the defendant Brand.

Mr. BONSALL.—I ask that the jury be instructed to disregard all testimony as to Hawkins.

The COURT.—Very well. I think I did make that clear.

Mr. WISEMAN.—That was my interpretation of that instruction.

The COURT.—If that crept in there it was through inadvertence. [252]

Mr. WISEMAN.—I believe that came just before

your Honor enumerated certain overt acts as (a), (b), (c), (d), and (e).

The COURT.—I think I can find that. This is what I said:

I instruct you not to consider as an overt act in this case the fact that George Hawkins sold intoxicating liquor at No. 1249 Polk Street in the City and County of San Francisco in violation of the National Prohibition Law, for the reason that George Hawkins has not been sufficiently identified in this trial as a co-conspirator. I instruct you further that you are not to consider as an overt act in this case the fact that Walter Brand sold liquor at 1249 Polk Street, in the City and County of San Francisco, in September, 1923. You have no objection to that, I suppose?

Mr. WISEMAN.—No, your Honor.

The COURT.—Do you remember what that was, Mr. Bonsall?

Mr. BONSALL.—To save time. I suggest that the jury be instructed to disregard all testimony as to George Hawkins.

The COURT.—Very well. The jury is so instructed. Does that satisfy you, Counsel?

Mr. WISEMAN.—Yes, your Honor. In other words, that any statement or any act done by the defendant Hawkins is not to be considered by this jury as connecting the defendant Marron.

The COURT.—That is correct.

Mr. WISEMAN.—The defendant Marron likewise respectfully excepts to that portion of your Honor's charge concerning overt acts alleged to

have been done and to be considered by the jury, if they so find them to have been done, in effecting the object of the conspiracy. The first related to Patrick Kissane—that he did on the 17th day of November, 1923, at 1249 Polk Street, receive, as a police officer, from the defendant Birdsall, the sum of $5.

The COURT.—That is alleged in the indictment, is it not? [253]

Mr. WISEMAN.—Yes, sir.

Mr. BONSALL.—It does not mention in the indictment that he is a police officer.

The COURT.—But he has been mentioned here during the trial as a police officer. There is no question about that. I did not use the exact language of the indictment, I made it as brief as I could.

Mr. WISEMAN.—I am not taking the exact language, either.

The COURT.—You are not taking any exception to the form of it?

Mr. WISEMAN.—Not to the form of it, no, but to the giving of the instruction.

The next is as to the overt act alleged to have been committed by Joseph Gorham receiving from George Birdsall the sum of $90.

The third, to which the defendant Marron excepts, is the overt act in November, 1923, wherein George Birdsall is alleged to have sold two drinks of whiskey to Rudolph Herring. I think that is the language of the indictment.

The COURT.—I did not say anything about to

whom it was sold. I simply referred generally to the overt act.

Mr. WISEMAN.—The fourth is the fact that in May, 1924, the defendant Marron maintained a common nuisance at 1249 Polk Street.

The fifth is that on the 15th day of May, 1924, George Birdsall maintained a common nuisance and kept for sale on the premises intoxicating liquor.

The defendant Marron likewise respectfully excepts to that portion of your Honor's charge concerning the transaction with the witness Nielsen, and particularly that portion of your Honor's charge to the jury concerning three trips to certain ships, and receiving cargo, the landing of two boatloads of cargo, and the [254] price paid for the cases of liquor.

Likewise, the defendant Marron excepts to that portion of your Honor's charge instructing the jury that the entries in Government's Exhibit No. 1 made by the defendant Marron might be considered by them as an overt act on the part of the defendant Marron.

Likewise, the defendant Marron excepts to that portion of your Honor's charge wherein the jury was advised that they might consider the fact that the witness Vaughn prepared a summary or audit of the book Government's Exhibit 1 at the request of the defendant Birdsall.

Likewise, the defendant Marron excepts to that portion of your Honor's charge wherein the jury were advised that they might find that a conspiracy

existed between the defendant Marron and George Birdsall.

The defendant Marron desires to respectfully except to the refusal of your Honor to give the following instructions—and I assume it will be sufficient if I refer to them by number without reading them?

The COURT.—Yes.

Mr. WISEMAN.—I am referring to the proposed instructions filed on behalf of the defendant Marron. Instructions Nos. 1, 7, 15, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, and that portion of instructions No. 30 beginning with the words "And the jury should not rely upon it unsupported unless it produces in their minds the most positive conviction of its truth." And continuing down to and including the balance of the instruction. Your Honor did give the first part of the instruction.

The COURT.—Yes. I went over your instructions very carefully and considered them in connection with the instructions prepared by myself.

Mr. WISEMAN.—Instructions 31, 32, 33, 34 and 35.

The COURT.—The jury may now retire. [255]

Defendant's instructions Nos. 1, 7, 15, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, 31, 32, 33, 34 and 35 hereinabove referred to as being excepted to were in the words and figures following, to wit:

INSTRUCTION No. 1.
EXCEPTION No. 114.

"Gentlemen of the Jury, I charge you that as to the defendant, Joseph E. Marron, there is not suffi-

cient evidence in support of a verdict of guilty, and I therefore instruct you to acquit the said defendant, Joseph E. Marron."

INSTRUCTION No. VII.

EXCEPTION No. 115.

Circumstances of suspicion, no matter how great or strong, are not proof of guilt, and the defendant must be found not guilty unless the facts establishing guilt are proved to a moral certainty and beyond a reasonable doubt.

INSTRUCTION No. XV.

EXCEPTION No. 116.

Mere knowledge of the existence of a conspiracy on the part of a defendant does not make him a party to such conspiracy, but to find such a defendant guilty of the conspiracy charged, you must be satisfied to a moral certainty and beyond a reasonable doubt that he not only had knowledge of, but actually participated in such conspiracy.

INSTRUCTION No. XIX.

EXCEPTION No. 117.

Under the indictment in this case the jury cannot find the defendant guilty of a violation or violations of the National Prohibition Act, no matter how well satisfied the jury may be as to the defendant having violated that Act, and in this connection I charge you that should you find the defendant not guilty of the conspiracy charged in this indictment, such verdict of not guilty does not bar or prevent the Government from proceeding against them for

any such violation of said National Prohibition Act, notwithstanding your verdict in this case.

INSTRUCTION XX.

EXCEPTION 118.

I charge you that before you can find the defendant Joseph E. Marron guilty of the offense charged in this indictment, you must first find that he was a party to the alleged conspiracy set out therein. If you have reasonable doubt at to whether or not he was a party to such alleged conspiracy, it will be your duty to return a verdict of not guilty as to him. [256]

INSTRUCTION No. XXI.

EXCEPTION No. 119.

The Government in this case has depended to a great extent upon circumstantial evidence. While you are deliberating on evidence presented, you must keep this rule of law in mind with [257] respect to the manner in which circumstantial evidence must be treated. In order to find a verdict of guilty based upon circumstantial evidence you must find that the evidence is of such a character that it is not only consistent with the hypothesis of guilt, but you must also find that it is inconsistent with any other reasonable or rational hypothesis. The deductions to be drawn from the circumstances are for the jury, and where a circumstance that is relied *upon the* Government as incriminating is clearly compatible with innocence, you must find in favor of the defendants, unless there are other circumstances sufficient to overcome the deduction

of innocence from the particular circumstance. The rule may be stated briefly as follows: A theory cannot be said to be established by circumstantial evidence unless the facts relied upon are of such nature and so related to each other that it is the only conclusion that can fairly or reasonably be drawn from them. It is not sufficient that they be consistent merely with a certain theory, for it may well be that they are consistent with a certain theory and yet have no tendency to prove that theory. Therefore, if other conclusions may reasonably be drawn from the circumstances as related, the evidence submitted by the prosecution will be sufficient to support a verdict of guilty.

Conjecture as to guilt is not sufficient, nor is the possibility of guilt from the mere existence of facts. If it appears from the testimony introduced by the prosecution that a conclusion other than guilty may be reasonably reached by you, it is your duty to return a verdict of not guilty. In other words, if two inferences can be drawn from a given state of facts, one of guilt and one of innocence, it is your duty to draw the one of innocence in favor of the defendant and to return a verdict of not guilty. (Wilbur vs. Emergency Hospital, 27 Cal. App. 759.)

INSTRUCTION No. XXII.

EXCEPTION No. 120. [258]

I charge you that participation in a conspiracy without knowledge of its existence or knowledge of a conspiracy without participation therein is not sufficient to warrant a conviction. Therefore if

you find that the defendant Joseph E. Marron knew that this conspiracy was in being but did not participate therein you must find him not guilty. Likewise if you find that Joseph E. Marron took any part in this alleged conspiracy but did not have knowledge of its existence you must find him not guilty.

INSTRUCTION No. XXIII.

EXCEPTION No. 121.

You are instructed that the defendant is on trial for the single conspiracy set forth in the indictment. This is the only offense that you can consider in arriving at a verdict. In determining the guilt or innocence of the defendant you are absolutely limited to the offense and charge contained in the indictment in this case. The Court, therefore, directs you to disregard any other offense which any of the testimony may have a tendency to show and to confine yourselves wholly to the one offense set forth in the indictment.

INSTRUCTION No. XXIV.

EXCEPTION No. 122.

There must be an intentional participation in the transaction with a view to the common design and purpose, before a party can be guilty of conspiracy.

U. S. vs. Nunnemacher, 27 Fed. Cas. No. 15,-902.

INSTRUCTION No. XXV.

EXCEPTION No. 123.

Evidence that each of several defendants acted illegally or maliciously with the same end in view

will not support a charge of conspiracy, unless it appears that such acts were done pursuant to mutual agreement.

Newhall vs. Jenkins, 26 Pac. 159. [259]

INSTRUCTION No. XXVI.

EXCEPTION No. 124.

You are instructed that an accomplice is a person who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.

You are further instructed that a conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to *convict* the defendant or defendants with the commission of the offense; and I further instruct you that the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

INSTRUCTION No. XXVII.

EXCEPTION No. 125.

The Court instructs the jury that it is the law that mere passive knowledge of any illegal action, connected with this case, if any such be shown by the evidence, on the part of any person herein charged with the conspiracy alleged by the Government, is not sufficient to show complicity, in the said alleged conspiracy. Proof of some active participation on the part of any such person is necessary. Co-operation, in other words, must be shown, and there must be intentional participation in the

alleged transaction with a view to the futherance of the common design and purpose. To establish the connection of either of the defendants with the alleged conspiracy, such connection must be shown by facts or circumstances, independent of the declarations of others; that is, by his own acts, conduct or declarations.

Byar vs. U. S., 216 Fed. 19, 20.

INSTRUCTION No. XXIX.
EXCEPTION No. 126.

You are instructed that until and unless the fact that the defendant did participate in the alleged conspiracy is established by proof of facts and circumstances independent of the declarations of others the defendant is not bound by the [260] declarations or statements of such others.

INSTRUCTION No. XXX.
EXCEPTION No. 127.

And the jury should not rely upon it unsupported unless it produces in their minds the most positive conviction of its truth. If it does the jury should act upon it. It is just and proper in such cases for the jury to seek for corroborating facts and circumstances in other material respects; but this is not absolutely essential, provided the testimony of such witnesses produces in the minds of the jury full and complete conviction of its truth. But where corroborating evidence is required, or is sought by the jury, it is the law that testimony of one or more accomplices is not sufficient to corroborate the testimony of other accomplices.

INSTRUCTION No. XXXI.

EXCEPTION No. 128.

I instruct you that a conviction for conspiracy cannot be had on the corroborated testimony of a co-conspirator or accomplice, nor can co-conspirator or accomplices corroborate each other.

U. S. vs. Logan, 45 Fed. 872.

INSTRUCTION No. XXXII.

EXCEPTION No. 129.

You are instructed that anyone who is concerned in the commission of a crime, either as a principal or an accessory, is an accomplice.

(16 C. J. 671.)

INSTRUCTION No. XXXIII.

EXCEPTION No. 130.

You are cautioned against placing too much reliance upon testimony of accomplices, and the uncorroborated testimony of a confessed perpetrator of a crime contradicted under oath by himself, contradicted by other witnesses and inspired by the hope of immunity from punishment, is not only insufficient to establish the guilt of a defendant beyond a reasonable doubt but [261] presents no substantial evidence of it.

Paraphrased from Sykes vs. U. S., 204 Fed. 909, 8th. Circ., and from McGinniss vs. U. S., 256 Fed. 621 at 626, 2d Circ.

INSTRUCTION No. XXXIV.

EXCEPTION No. 131.

You are instructed that while "conviction may be had in the Federal Courts upon the uncorroborated

evidence of an accomplice, if the story, as told, is straightforward and has a ring of truth and indicates unequivocally the guilt of the accused," "your attention nevertheless is 'Cautiously and sharply' directed 'to the exercise of care and caution in viewing such evidence and that the testimony of the accomplice be convincing proof of the guilt of the accused' before you believe it."

McGinniss vs. U. S., 256 Fed. 621, at 626.

INSTRUCTION No. XXXV.

EXCEPTION No. 132.

You are cautioned against placing too much reliance upon the testimony of accomplices and you may require corroborating testimony before giving credence to it.

Holmgren vs. U. S., 217 U. S. 509, 54 L. Ed. 861.

U. S. vs. Murphy, 253 Fed. 404; Dist. Court, N. Y.

That after the Court had completed its charge to the jury, the jury retired to deliberate upon its verdict, and thereafter brought in a verdict as follows: [262]

[Title of Court and Cause.]

VERDICT.

We, the jury, find as to the defendant at the bar, as follows:

JOSEPH E. MARRON—Guilty.

_____

Foreman.

[Endorsed]: Filed April 28, 1926, at 2:00 o'clock and forty-five (45) minutes P. M.

Thereupon, at said time, the attorneys for Joseph E. Marron presented to the Court motion for a new trial on behalf of the defendant, Joseph E. Marron, which said motion was and is in the following words and figures, to wit: [263]

[Title of Court and Cause.]

EXCEPTION No. 133.

MOTION FOR NEW TRIAL FOR DEFENDANT JOSEPH E. MARRON.

Now comes the defendant Joseph E. Marron and moves the Court that the verdict herein rendered be vacated and a new trial heard for the following reasons:

1. That the verdict is contrary to the evidence.
2. That the verdict is contrary to the weight of the evidence.
3. That the verdict is contrary to the law as given to the jury by the Court.
4. That the Court erred in refusing defendant Joseph E. Marron specal instructions, Nos. 1, 7, 15, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, 31, 32, 34, 35.
5. That the Court erred in so much of its general charge as is left to the jury to determine whether or not the defendant, here, was the party to the, or any, conspiracy as charged in the indictment.
6. That the Court erred in admitting evidence contrary to law.

7. That new and material facts have come to light since the trial. [264]

8. That other errors at law appeared upon the trial, prejudicial to defendant. (85)

9. That errors at law occurred during the trial of the case in admitting evidence prior to June, 1923, and subsequent to October 3, 1924, which were duly excepted to by the defendant.

10. Errors of law occurring at the trial and excepted to by the defendant.

11. Further, on the ground of newly discovered evidence.

HUGH L. SMITH and
CHAS. J. WISEMAN,
Attorneys for Defendant Joseph E. Marron.

Receipt of a copy of the within motion for new trial is hereby admitted this —— day of ———.

Said motion for a new trial was thereupon submitted to the Court for its decision, and after due consideration the Court denied the motion for a new trial, to which ruling the attorneys for defendant Marron then and there duly excepted.

Thereupon and at the same time the attorneys for the defendant Marron presented to the Court a motion in arrest of judgment, which motion was and is in the words and figures following, to wit: [265]

[Title of Court and Cause.]

EXCEPTION No. 134.

MOTION IN ARREST OF JUDGMENT (JOSEPH E. MARRON).

Now comes the defendant, Joseph E. Marron in the above-entitled action and against whom a verdict of guilty was rendered on the 28th day of April, 1926, on the indictment filed herein, and moves the Court to arrest the judgment against said defendant on said indictment and hold for naught the verdict of guilty rendered against him for the following reasons:

1. That said indictment does not charge any offense against the laws of the United States nor does it charge said defendant with the doing of anything, the doing of which is forbidden by the laws of the United States.

2. That said indictment does not set forth any facts sufficient in law to constitute a conviction.

3. That there is no fact or circumstance stated therein to advise the Court that an offense has been committed against the United States.

4. That evidence against this defendant has been received and considered there on matters pertaining to former jeopardy after said jeopardy had already attached as to each of them. [266]

5. That said indictment fails to set forth every element of the offense intended to be charged.

6. That it does not set forth any facts sufficient (89) in law to support a conviction.

7. That this defendant has been convicted without due process of law, and in violation of Articles IV, V, and VI of Amendments of the Constitution of the United States.

WHEREFORE, this defendant prays that this motion be sustained and the judgment of conviction against him be arrested and held for naught, and that he have all such other orders as may be just and proper in the premises.

HUGH L. SMITH and
CHAS. WISEMAN,
Attorneys for Defendant Joseph E. Marron.

Receipt of a copy of the within motion in arrest of judgment is hereby admitted this —— day of ————.

Said motion in arrest of judgment was thereupon submitted to the Court for its decision and after due consideration the Court denied the motion in arrest of judgment, to which ruling the attorneys for the defendant, Joseph E. Marron, then and there duly and regularly excepted.

The Court having denied the motion for the new trial and the motion in arrest of judgment as to the said defendant, thereupon rendered its judgment: That whereas the said Joseph E. Marron, having been duly convicted in this court for the crime of conspiracy;

IT IS THEREFORE ORDERED AND ADJUDGED that the said defendant Marron be imprisoned for 2 years in the penitentiary and [267]

and a fine of Ten Thousand Dollars ($10,000); judgment entered this 26th day of April, 1926.

WALTER B. MALING,
Clerk.

By ————————,
Deputy Clerk.

EXCEPTION No. 135.

Prior to the time of the trial of said cause, on April 17, 1926, the said defendant, Joseph E. Marron, made and filed the following petition for return of property and to suppress evidence, which said petition was denied by the said Court and exception to such order duly taken. Said petition was and is in the following words and figures to wit: [268]

[Title of Court and Cause.]

PETITION FOR RETURN OF PROPERTY AND TO SUPPRESS EVIDENCE (MOTION "A").

To the Honorable JOHN S. PARTRIDGE, Judge of the District Court of the United States in and for the Northern District of California:

The Petition of JOSEPH E. MARRON respectfully shows:

I.

That at all of the times herein mentioned Samuel Rutter was the duly qualified and acting Prohibition Director of the State of California.

II.

That on or about the 2d day of October, 1924, a

Federal Prohibition Agent, acting under and pursuant to the authority of the said Samuel Rutter, made and executed an affidavit, a copy of which is hereto attached and made a part hereof, marked Exhibit "A," which said affidavit prayed that a search-warrant be issued to search the premises commonly known and designated as No. 1249 Polk Street, in the City and County of San Francisco, State of California. [269]

III. .

That on or about the said 2d day of October, 1924, Albert M. Hardie, a United States Commissioner in and for the Northern District of California, issued a purported search-warrant to search said premises described as aforesaid, a copy of which said search-warrant is hereto attached, made a part hereof, and marked Exhibit "B."

IV.

That on or about the said 2d day of October, 1924, pursuant to the authority conferred upon them in said search-warrant the said Samuel Rutter through F. W. Whittier and other Federal Prohibition Agents whose names are unknown to your petitioner, entered the said premises known as No. 1249 Polk Street, in the said City and County of San Francisco, State of California, and seized and carried away therefrom certain personal property, to wit: Certain papers, records, books of account and ledgers, which were and are the private and personal property of your petitioner.

V.

That your petitioner, Joseph E. Marron, was, on said 2d day of October, 1924, and at all of the times herein mentioned the lessee and occupant of the premises known as No. 1249 Polk Street San Francisco, California.

VI.

That said search and said seizure, as aforesaid, was and is in direct violation of your petitioner's constitutional rights under the Fourth and Fifth Amendments to the Constitution of the United States of America, for the following reasons, to wit:

a. The seizure of the said papers, records, books of account and ledgers, was done in contravention of the rights of your petitioner under the Fourth Amendment to the Constitution of the United States of America, for the reason that said papers, records, [270] books of account and ledger were not particularly described in the search-warrant as things to be seized, as required by the said Amendment.

b. The said papers, records, books of account and ledger were not instruments or fruits of crime, but on the contrary were and are the private memoranda, the private property and the private papers, documents and writings of your petitioner.

c. The said purported search-warrant only authorizes the said Federal Prohibition Agents, as aforesaid, to search the said premises as aforesaid, for the following described personal property, to wit:

Intoxicating liquor, to wit, alcohol, brandy, wine, whiskey, rum, gin, beer, ale, porter, sherry wine, port wine, jackass brandy, corn whiskey, wine of pepsin, neuropin, pepsin rennin, fermented grape juice and spirituous, vinous malt and fermented liquors, liquids and compounds by whatever name called containing one-half of one per centum or more of alcohol and fit for use for beverage purposes, stills, worms, coils, mashes, goosenecks, hydrometers, essences, caramel, coloring materials, boilers.

d. The said Federal Prohibition Agents, above referred to, were at the time of executing the warrant, as aforesaid, unlawfully upon the premises and were at said time and said place trespassers in taking the said papers, records, books of account and ledger.

e. The said papers, records, books of account and ledger were not upon the person of your petitioner, but on the contrary were located in the said premises hereinabove referred to.

f. There was neither identification of the said papers, records, books of account and ledger, nor probable cause alleged in the affidavit marked Exhibit "A" in this petition, for the [271] seizure of the papers, records, books of account and ledger, and that their taking was illegal and void.

VII.

That your petitioner is informed and believes and therefore alleges that the United States Government proposes to and will, unless restrained by

this Honorable Court, use said personal property seized as aforesaid, as evidence against your petitioner in the trial of the above-entitled action.

WHEREFORE, your petitioner prays that an order be made forthwith directing the return of said personal property hereinabove described and set forth, and that all matters pertaining thereto, and all things or matters discovered as a result of the entries of private matters contained therein be excluded as evidence.

JOSEPH E. MARRON,
Petitioner.
CHARLES J. WISEMAN and
HUGH L. SMITH,
Attorneys for Petitioner. [272]

State of California,
City and County of San Francisco,—ss.

Joseph E. Marron, being first duly sworn, deposes and says: That he is the petitioner in the above and foregoing petition for return of property and to suppress evidence; that he has read said petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to those matters, he believes it to be true.

JOSEPH E. MARRON.

Subscribed and sworn to before me this 16th day of April, 1926.

[Seal] JOHN WISNOM,
Notary Public in and for the City and County of San Francisco, State of California. [273]

EXHIBIT "A."

United States of America,
Northern District of California,
County of Alameda,—ss.

On this 1st day of Oct., 1924, before me, Albert M. Hardie, a United States Commissioner in and for the Northern District of California, personally appeared C. A. Howard, who being first duly sworn, deposes and says:

That he is and at all of the times herein mentioned was a Federal Prohibition Agent and as such makes this affidavit and presents the facts and circumstances hereinafter set out that heretofore came to the personal knowledge of and as positively known to affiant to exist. That this affidavit is made for the purpose of having issued hereon and hereunder a search-warrant to search the following described premises and place, to wit:

1249 Polk St., San Francisco, Cal., including the entire second floor, flat or club, all rooms, lockers, closets, safes, shelves, sheds, drawers, basement, attic, pantries, cupboards, iceboxes. Entire premises, name of owner, or occupant, Eddie Marron.

That in and upon the aforesaid premises and place and on or about the 22nd day of Sept., 1924, intoxicating liquor as defined by Section 1 of Title II of the Act of October 28, 1919, known as the National Prohibition Act, containing one-half of one per centum or more of alcohol by volume and fit for use for beverage purposes, was then and

there and now are kept, sold, possessed and bartered in violation of Title II of the said National Prohibition Act, and particularly in violation of Section 3 and 21 of said Title II.

That affiant on or about the 22d day of September, 1924, visited the above and foregoing mentioned and described premises and purchased from the person in charge in said premises certain intoxicating liquor, to wit: fifteen drinks of Bourbon whiskey for which he paid fifty cents each; description of person in charge of premises; height, 5 ft. 7 in.; weight, about 165 lbs.; age, 47 yrs.; large nose, deep set eyes; slightly gray hair, high cheeks bones; male.

That it will be necessary to enter the said premises and place to search the same and every part thereof in order to secure the said intoxicating liquor therein for the United States Government and that it will be impossible to secure the same or any part thereof without the aid and use of a search-warrant.

WHEREFORE, affiant applies for and prays that a search-warrant to enter the said premises and place and therein to search for the said intoxicating liquor be issued pursuant to the statute in such cases made and provided.

C. A. HOWARD.

Subscribed and sworn to before me this 1st day of October, 1924.

ALBERT M. HARDIE,
United States Commissioner in and for the Northern District of California. [274]

EXHIBIT "B."

To the Federal Prohibition Director in and for the State of California, and to His Assistants, Agents and Inspectors and Any or Either of Them, GREETING:

WHEREAS, C. A. HOWARD, a Federal Prohibition Agent, was as such Agent on the 1st day of Oct., 1924, by me, Albert M. Hardie, as United States Commissioner in and for the Northern District of California, at Oakland, California, first duly sworn, and by me as such Commissioner examined on his oath as to all the facts and circumstances personally known to said Agent, respecting the violations of the Act of October 28, 1919, known as the "National Prohibition Act" and referred to in the affidavit hereto attached, and

WHEREAS, the said Agent thereafter and heretofore, to-wit, on the said last mentioned date made and filed with me as such Commissioner his affidavit, which said affidavit is hereto attached marked Exhibit "A" and by reference made a part hereof to all intents and purposes the same as if herein in this warrant set out in full, and

WHEREAS, the said examination and affidavit was had and made for the purpose of having issued thereunder and thereon a search-warrant to search the premises described in said affidavit for the property mentioned and described therein, and

WHEREAS, from the said examination and facts set out in said affidavit, I, ALBERT M. HARDIE,

as such Commissioner, being thereupon and therefrom satisfied of the existence of the grounds of the application and that there is probable cause to believe that the grounds of and upon which the application is based, do exist, I find that there is probable cause for the issuance of this warrant; that the particular grounds and probable cause for the issuance of this search-warrant are the facts and circumstances set out in the affidavit of C. A. HOWARD hereto attached and made a part hereof as hereinabove set out.

NOW, THEREFORE, pursuant to Section 25 of Title II of the said National Prohibition Act, you are hereby authorized and empowered to enter the premises and place mentioned, referred to and described in said affidavit, and every part thereof, in the day or night time and to thoroughly search the same for the following described property, to wit: intoxicating liquor, to wit, alcohol (jackass brandy, corn whiskey, wine of pepsin, neuropin, pepsin rennin, fermented grape juice), brandy, wine, whiskey, rum, gin, beer, ale, porter, sherry wine, port wine, and spirituous, vinous, malt and fermented liquors, liquids and compounds by whatever name called containing one-half of one per centum or more of alcohol and fit for use for beverage purposes, stills, worms, coils, mashes, goosenecks, hydrometers, essences, caramel, coloring materials, boilers, and if found to seize the same and take it into your possession to the end that the said property may be thereafter dealt with according to law, and hereof to make due return with written inven-

tory of the property taken by you or any or either of you, within ten days as required by law.

WITNESS my hand and official seal this 1st day of October, 1924.

ALBERT M. HARDIE,
United States Commissioner in and for the Northern District of California. [275]

[Endorsed]: Filed April 17, 1926.

Minutes of the Court—April 20th, 1926—Order Denying Petitions to Exclude Evidence.

This cause came on regularly for hearing on various petitions to return property and to suppress evidence. After hearing Hugh L. Smith and Chas. J. Wiseman, Attorneys for Defendant, and Edgar T. Bonsall, Asst. U. S. Attorney, ordered petitions for return of property and to suppress evidence denied, to which order the said attorneys for the defendant duly and regularly entered their exception. [276]

EXCEPTION No. 136.

Prior to the time of the trial of said cause, on April 17, 1926, the said defendant, Joseph E. Marron, made and filed the following petition for return of property and to suppress evidence, which said petition was denied by the said Court and exception to such order duly taken. Said petition was and is in the following words and figures, to wit: [277]

[Title of Court and Cause.]

PETITION FOR RETURN OF PROPERTY AND TO SUPPRESS EVIDENCE (MOTION "B").

To the Honorable District Court of the United States, in and for the Northern District of California:

The petition of Joseph E. Marron respectfully shows:

I.

That at all of the times herein mentioned Samuel Rutter was the duly qualified and acting Prohibition Director of the State of California.

II.

That on or about the 2d day of October, 1924, a Federal Prohibition Agent, acting under and pursuant to the authority of the said Samuel Rutter, made and executed an affidait, a copy of which is hereto attached and made a part hereof, marked Exhibit "A," which said affidavit prayed that a search-warrant be issued to search the premises commonly known and designated as No. 1249 Polk Street, in the City and County of San Francisco, State of California.

III.

That on or about the said 2d day of October, 1924, Albert [278] M. Hardie, a United States Commissioner in and for the Northern District of California, issued a purported search-warrant to search said premises described as aforesaid, a copy

of which said search-warrant is hereto attached, made a part hereof, and marked Exhibit "B."

IV.

That on the 2d day of October, 1924, Samuel Rutter, as the duly qualified and acting Prohibition Director for the State of California, through his agent W. F. Whittier, and other prohibition agents, whose names are unknown to your petitioner, entered the premises known as No. 1249 Polk Street, San Francisco, California, and carried away therefrom personal property, including among other things, certain papers, records and books of account, which said papers, records and books of account are the private and personal property of your petitioner, Joseph E. Marron; that at the time of said seizure of said personal property, said prohibition agents were acting upon what purported to be a search-warrant lawfully issued, authorizing the search of said premises for certain specified and described property, which did not include the papers, records and account-books, hereinabove described.

V.

That said purported search-warrant only authorized the said prohibition agents to search the said premises for the following described property, to wit:

> Intoxicating liquor, to wit, alcohol, brandy, wine, whiskey, rum, gin, beer, ale, porter, sherry wine, port wine, jackass brandy, corn whiskey, wine *or* pepsin, neuropin, pepsin rennin, fermented grape juice and spirituous, vinous,

malt and fermented liquors, liquids and compounds by whatever name called containing one-half of one per centum or more [279] of alcohol and fit for use for beverage purposes, stills, worms, coils, mashes, goosenecks, hydrometers, essences, caramel, coloring materials, boilers.

That the said seizure by the said prohibition agents of that portion of the personal property seized on said 2d day of October, 1924, to wit, said papers, records, and books of account, was unlawful, unreasonable and unwarranted and when said prohibition agents seized said property they became trespassers *ab initio* on said premises of your petitioner, Joseph E. Marron, and therefore the seizure of the personal property authorized to be seized under and by virtue of said purported search-warrant became unlawful.

VI.

That said search and said seizure, as aforesaid, was and is in direct violation of your petitioner's constitutional rights under the Fourth and Fifth Amendments to the Constitution of the United States of America, for the following reasons, to wit:

a. The seizure of the said papers, records, books of account and ledgers, was done in contravention of the rights of your petitioner under the Fourth Amendment to the Constitution of the United States of America, for the reason that said papers, records, books of account and ledger were not particularly described in the search-warrant as things to be seized, as required by the said Amendment.

b. The said papers, records, books of account and ledger were not instruments or fruits of crime, but on the contrary were and are the private memoranda, the private property and the private papers, documents and writings of your petitioner.

c. The said purported search-warrant only authorizes the said Federal Prohibition Agents, as aforesaid, to search the said premises as aforesaid, for the following described personal property, to wit:

> Intoxicating liquor, to wit, alcohol, brandy, wine, [280] whiskey, rum, gin, beer, ale, porter, sherry wine, port wine, jackass brandy, corn whiskey, wine of pepsin, neuropin, pepsin rennin, fermented grape juice and spirituous, vinous, malt and fermented liquors, liquids and compounds by whatever name called containing one-half of one per centum or more of alcohol and fit for use for beverage purposes, stills, worms, coils, mashes, goosenecks, hydrometers, essences, caramel, coloring, materials, boilers.

d. The said Federal Prohibition Agents, above referred to, were at the time of executing the warrant, as aforesaid, unlawfully upon the premises and were at said time and said place trespassers in taking the said papers, records, books of account and ledger.

e. The said papers, records, books of account and ledger were not upon the person of your petitioner, but on the contrary were located in the said premises hereinabove referred to.

f. There was neither identification of the said papers, records, books of account and ledger, nor probable cause alleged in the affidavit marked Exhibit "A" in this petition, for the seizure of the papers, records, books of account and ledger, and that taking was illegal and void.

VII.

Petitioner is informed and believes, and therefore alleges that the United States Government proposes to use said personal property as evidence against your petitioner in a conspiracy action now pending.

WHEREFORE, petitioner prays that an order be made directing the return of said property seized on the 2d day of October, 1924, that all matters pertaining thereto and all things or matters discovered as a result thereof be suppressed as evidence.

JOSEPH E. MARRON,
Petitioner.
CHARLES J. WISEMAN,
HUGH L. SMITH,
Attorneys for Petitioner. [281]

State of California,
City and County of San Francisco,—ss.

Joseph E. Marron, being first duly sworn, deposes and says: That he is the petitioner in the above and foregoing petition for return of property and to suppress evidence; that he has read said petition and knows the contents thereof; that the same is true of his own knowledge, except as to the

matters therein stated on information or belief, and as to those matters, he believes it to be true.

JOSEPH E. MARRON.

Subscribed and sworn to before me this 16th day of April, 1926.

[Seal] JOHN WISNOM,

Notary Public in and for the City and County of San Francisco, State of California. [282]

EXHIBIT "A."

United States of America,
Northern District of California,
County of Alameda,—ss.

On this 1st day of Oct., 1924, before me, Albert M. Hardie, a United States Commissioner in and for the Northern District of California personally appeared C. A. Howard who being first duly sworn, deposes and says:

That he is and at all of the times herein mentioned was a Federal Prohibition Agent and as such makes this affidavit and presents the facts and circumstances hereinafter set out that heretofore came to the personal knowledge of and as positively known to affiant to exist. That this affidavit is made for the purpose of having issued hereon and hereunder a search-warrant to search the following described premises and place, to wit:

1249 Polk St., San Francisco, Cal., including the entire second floor, flat or club, all rooms, lockers, closets, safes, shelves, sheds, drawers, basement, attic, pantries, cupboards, ice-boxes. Entire premises, name of owner, or occupant, Eddie Marron.

That in and upon the aforesaid premises and place and on or about the 22d day of Sept., 1924, intoxicating liquor as defined by Section I of Title II of the Act of October 28, 1919, known as the National Prohibition Act, containing one-half of one per centum or more of alcohol by volume and fit for use for beverage purposes, was then and there and now are kept, sold, possessed and bartered in violation of Title II of the said National Prohibition Act, and particularly in violation of Section 3 and 21 of said Title II.

That affiant on or about the 22d day of September, 1924, visited the above and foregoing mentioned and described premises and purchased from the person in charge in said premises certain intoxicating liquor, to wit: fifteen drinks of Bourbon whiskey for which he paid fifty cents each; description of person in charge of premises: height, 5 ft. 7 in.; weight, about 165 lbs.; age, 47 yrs.; large nose, deep set eyes; slightly gray hair, high cheeks bones; male. That it will be necessary to enter the said premises and place to search the same and every part thereof in order to secure the said intoxicating liquor therein for the United States Government and that it will be impossible to secure the same or any part thereof without the aid and use of a search-warrant.

WHEREFORE, affiant applies for and prays that a search-warrant to enter the said premises and place and therein to search for the said intoxicating liquor be issued pursuant to the statute in such cases made and provided.

C. A. HOWARD.

Subscribed and sworn to before me this 1st day of October, 1924.

ALBERT M. HARDIE,
United States Commissioner in and for the Northern District of California. [283]

EXHIBIT "B".

To the Federal Prohibition Director in and for the State of California, and to His Assistants, Agents and Inspectors and Any or Either of Them: GREETING:

WHEREAS, C. A. HOWARD, a Federal Prohibition Agent, was as such Agent on the 1st day of Oct., 1924, by me, Albert M. Hardie, as United States Commissioner in and for the Northern District of California, at Oakland, California, first duly sworn, and by me as such Commissioner examined on his oath as to all the facts and circumstances personally known to said Agent, respecting the violations of the Act of October 28, 1919, known as the "National Prohibition Act," and referred to in the affidavit hereto attached, and

WHEREAS, the said Agent thereafter and heretofore, to wit, on the said last mentioned date made and filed with me as such Commissioner his affidavit, which said affidavit is hereto attached marked "Exhibit A" and by reference made a part hereof to all intents and purposes the same as if herein in this warrant set out in full, and

WHEREAS, the said examination and affidavit was had and made for the purpose of having issued thereunder and thereon a search-warrant to search

the premises described in said affidavit for the property mentioned and described therein, and

WHEREAS, from the said examination and facts set out in said affidavit, I, Albert M. Hardie, as such Commissioner, being thereupon and therefrom satisfied of the existence of the grounds of the application and that there is probable cause to believe that the grounds of and upon which the application is based, do exist, I find that there is probable cause for the issuance of this warrant; That the particular grounds and probable cause for the issuance of this search-warrant are the facts and circumstances set out in the affidavit of C. A. Howard hereto attached and made a part hereof as hereinabove set out.

NOW, THEREFORE, pursuant to Section 25 of Title II of the said National Prohibition Act, you are hereby authorized and empowered to enter the premises and place mentioned, referred to and described in said affidavit, and every part thereof, in the day or night time and to thoroughly search the same for the following described property, to wit: Intoxicating liquor, to wit, alcohol (jackass brandy, corn whiskey, wine of pepsin, neuropin, pepsin rennin, fermented grape juice), brandy, wine, whiskey, rum, gin, beer, ale, porter, sherry wine, port wine, and spirituous, vinous, malt and fermented liquors, liquids and compounds by whatever name called containing one-half of one per centum or more of alcohol and fit for use for beverage purposes, stills, worms, coils, mashes, goosenecks, hydrometers, essences, caramel, coloring materials, boilers, and if found to seize the same and take it

into your possession to the end that the said property may be thereafter dealt with according to law, and hereof to make due return with written inventory of the property taken by you or any or either of you, within ten days as required by law.

WITNESS my hand and official seal this 1st day of October, 1924.

ALBERT M. HARDIE,
United States Commissioner in and for the Northern District of California. [284]

[Endorsed]: Filed April 17, 1926.

Minutes of the Court—April 20th, 1926—Order Denying Petitions to Exclude Evidence.

This cause came on regularly for hearing on various petitions to return property and to suppress evidence. After hearing Hugh L. Smith and Chas. J. Wiseman, Attorneys for Defendant, and Edgar T. Bonsall, Asst. U. S. Attorney, ordered petitions for return of property and to suppress evidence denied, to which order the said attorneys for the defendant duly and regularly entered their exception. [285]

EXCEPTION No. 137.

Prior to the time of the trial of said cause, on April 17, 1926, the said defendant, Joseph E. Marron, made and filed the following petition for return of property and to suppress evidence, which said petition was denied by the said Court and exception to such order duly taken. Said petition was and is in the following words and figures, to wit: [286]

[Title of Court and Cause.]

PETITION FOR RETURN OF PROPERTY AND TO SUPPRESS EVIDENCE (MOTION "D").

To the Honorable JOHN S. PARTRIDGE, Judge of the District Court of the United States in and for the Northern District of California:

The petition of Joseph E. Marron respectfully shows:

I.

That at all of the times herein mentioned Samuel Rutter was the duly qualified and acting Prohibition Director of the State of California.

II.

That on or about the 2d day of October, 1924, a Federal Prohibition Agent, acting under and pursuant to the authority of said Samuel Rutter, made and executed an affidavit, a copy of which said affidavit is attached to the petition filed herein designated as petition "A," the Court's attention being respectfully directed to said petition for the full contents of said affidavit, which said affidavit prayed that a search-warrant be issued to search the premises commonly known and designated as No. 1249 Polk Street, in the City and County of San [287] Francisco, State of California.

III.

That on or about the 2d day of October, 1924, Albert M. Hardie, a United States Commissioner

in and for the Northern District of California, issued a purported search-warrant to search said premises described as aforesaid, a copy of which said warrant is attached to petition "A" referred to in the foregoing paragraph, the attention of the Court being respectfully directed to said petition "A" for the full contents of said search-warrant.

IV.

That on or about the said 2d day of October, 1924, pursuant to the authority conferred upon them in said search-warrant the said Samuel Rutter through F. W. Whittier and other Federal Prohibition Agents whose names are unknown to your petitioner, entered the said premises known as No. 1249 Polk Street, in the said City and County of San Francisco, State of California, and seized and carried away therefrom certain personal property, to wit: certain papers, records, books of account and ledgers, which were and are the private and personal property of your petitioner.

V.

That your petitioner, Joseph E. Marron, was, on said 2d day of October, 1924, and at all of the times herein mentioned, the lessee and occupant of the premises known as No. 1249 Polk Street, San Francisco, California.

VI.

That said search and said seizure, as aforesaid, was and is in direct violation of your petitioner's constitutional rights under the Fourth and Fifth Amendments to the Constitution [288] of the

United States of America, for the following reasons, to wit:

2. The seizure of the said papers, records, books of account and ledgers, was done in contravention of the rights of your petitioner under the Fourth Amendment to the Constitution of the United States of America, for the reason that said papers, records, books of account and ledger were not particularly described in the search-warrant as things to be seized, as required by the said Amendment.

b. The said papers, records, books of account and ledger were not instruments or fruits of crime. but, on the contrary, were and are the private memoranda, the private property and the private papers, documents and writings of your petitioner.

c. The said purported search-warrant only authorizes the said Federal Prohibition Agents, as aforesaid, to search the said premises as aforesaid, for the following described personal property, to wit:

> Intoxicating liquor, to wit, alcohol, brandy, wine, whiskey, rum, gin, beer, ale, porter, sherry wine, port wine, jackass brandy, corn whiskey, wine of pepsin, neuropin, pepsin rennin, fermented grape juice and spirituous, vinous, malt and fermented liquors, liquids and compounds by whatever name called containing one-half of one per centum or more of alcohol and fit for use for beverage purposes, stills, worms, coils, mashes, goosenecks, hydro-

meters, essences, caramel, coloring materials, boilers.

d. The said Federal Prohibition Agents, above referred to, were at the time of executing the warrant, as aforesaid, unlawfully upon the premises and were at said time and said place trespassers in taking the said papers, records, books of account and ledger. [289]

e. The said papers, records, books of account and ledger were not upon the person of your petitioner, but, on the contrary, were located in the said premises hereinabove referred to.

f. There was neither identification of the said papers, records, books of account and ledger, nor probable cause alleged in the affidavit hereinbefore referred to as having been set out in petition "A" filed herein, for the seizure of the papers, records, books of account and ledger, and that their taking was illegal and void.

g. That at the time the said Prohibition Agents served said warrant and seized said papers, records, books of account and ledger they failed and neglected to conform to the requirements of said search-warrant, in this:

1. That they failed to make due return with written inventory of the property so taken (i. e., papers, records, books of account and ledger) within ten days as required by law, or at all.

2. That they failed and neglected to comply with the requirement of said search-warrant as set forth in Section 25, Title 2 of said National Prohibition Act and Section 12, Title 11, of the Espion-

age Act (Comp. St. 1918; Comp. St. Ann. Supp. 1919, Sec. 10496¼ L) by failing to give a receipt for the property taken (i. e., papers, records, books of account and ledger) specifying it in detail to the person from whom it was taken or in whose possession it was found; or, in the absence of any person at the time of the service of said warrant, in leaving said receipt for said property where the property was found.

h. That the failure of said agents, or either of them, to comply with the said requirements of said search-warrants as hereinabove [290] set out rendered all proceedings thereunder, and particularly that portion with respect to the seizure of said papers hereinabove enumerated, void, and all evidence obtained thereby inadmissible.

i. That attached hereto and marked Exhibit "A" is an exact copy of the return made by said Prohibition Agent Whittier on said warrant hereinabove referred to.

VII.

That your petitioner is informed and believes and therefore alleges that the United States Government proposes to and will, unless restrained by this Honorable Court, use said personal property seized as aforesaid as evidence against your petitioner in the trial of the above-entitled action.

WHEREFORE, your petitioner prays that an order be made forthwith directing the return of said personal property hereinabove described and set forth, and that all matters pertaining thereto, and all things or matters discovered as a result of

the entries of private matters contained therein, be excluded as evidence.

JOSEPH E. MARRON,
Petitioner.
CHARLES J. WISEMAN and
HUGH L. SMITH,
Attorneys for Petitioner. [291]

State of California,
City and County of San Francisco,—ss.

Joseph E. Marron, being first duly sworn, deposes and says: That he is the petitioner in the above and foregoing petition for return of property and to suppress evidence; that he has read said petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to those matters he believes it to be true.

JOSEPH E. MARRON.

Subscribed and sworn to before me this 16th day of April, 1926.

JOHN WISNOM,
Notary Public in and for the City and County of San Francisco, State of California. [292]

EXHIBIT "A."

RETURN ON SEARCH-WARRANT.

Returned, this 2 day of October, 1924. Served by making search as within directed, upon which search I found:

16 pint bottles champagne.
9—1/5 gal. bottles white wine.
5—1/5 gal. bottle whiskey.
2—quart bottle whiskey.
1—1/5 gal. bottle gin 3/4 full.
1—1/5 gal. bottle full gin.
2 bottles Bacardi Rum.
1—1/5 gal. bottle brandy.
2—1/5 gal. bottle Scotch whiskey.
1—1/5 gal. bottle 1/2 full Scotch whiskey.
1 bottle vermouth.
1 bottle picon 1/3 full.
1—1 gal. bottle 3/4 full gin.
8 bottles sweet wine.
1 bottle 1/3 full whiskey.
1—1 gal. bottle 1/6 full sweet wine.
2 sacks Canadian beer.
174 bottles home brew beer.

And duly inventoried the same as above, according to law.

W. F. WHITTIER.

I, W. F. Whittier, the officer by whom this warrant was executed, do swear that the above inventory contains a true and detailed account of the property taken by me on the warrant.

W. F. WHITTIER,

Subscribed and sworn to before me this —— day of ——, 1924.

_____,

United States Commissioner, Northern District of California. [293]

[Endorsed]: Filed April 17, 1926. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

Minutes of the Court—April 20th, 1926—Order Denying Petitions to Exclude Evidence.

This cause came on regularly for hearing on various petitions to return property and to suppress evidence. After hearing Hugh L. Smith and Chas. J. Wiseman, Attorneys for Defendant, and Edgar T. Bonsall, Asst. U. S. Attorney, ordered petitions for return of property and to suppress evidence denied, to which order the said attorneys for the defendant duly and regularly entered their exception. [294]

The above bill of exceptions contains all the evidence, oral and documentary and all the proceedings relating to the trial, judgment and conviction and sentence, motion for a new trial and motion in arrest of judgment of the said defendant.

WHEREFORE in order that all the proceedings had upon the trial of the above-entitled cause may be preserved and the defendant herein proposed the foregoing as a full and correct bill of exceptions of all the proceedings had and all the evidence adduced at the trial by both the plaintiff and the defendant and prays that the same may be settled and allowed as a bill of exceptions of such proceedings to be used on an appeal from the judgment herein.

Dated May 4, 1926.

HUGH L. SMITH and
CHAS. J. WISEMAN,
Attorneys for Defendant, Joseph E. Marron.

[Title of Court and Cause.]

STIPULATION IN RE BILL OF EXCEPTIONS.

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the United States of America and the defendant, Joseph E. Marron, that all exhibits introduced in evidence and for identification upon the trial of the above-entitled cause, and now in the custody of the Clerk of the court, shall be deemed to be included as a part of the foregoing bill of exceptions, with the same effect and in all respects as if incorporated in said bill of exceptions. [295]

In the event that said exhibits are not so numbered as identified, the same shall be marked by the Court upon its certification of this bill of exceptions so as to identify the same.

Dated May 4, 1926.

GEO. J. HATFIELD,

U. S. Attorney for the United States of America.

HUGH L. SMITH,

Attorneys for Defendant, Joseph E. Marron.

CHAS. J. WISEMAN,

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the United States of America and the attorneys for the defendant, Joseph E. Marron, that the proposed bill of exceptions of said defendant on said writ of error sued out herein, has been correctly engrossed and has been presented in time and as en-

grossed, may be approved and allowed and settled by the Judge of the above-entitled court as correct in all respects.

Dated May 4, 1926.

GEO. J. HATFIELD,
T. J. SHERIDAN,
Attorneys for the United States of America.
HUGH L. SMITH,
CHAS. J. WISEMAN,
Attorneys for Defendant, Joseph E. Marron.

The foregoing bill of exceptions, duly proposed and agreed upon by the counsel for the respective parties, is correct in all respects, and it is hereby approved and allowed and settled and made a part of the record herein as per stipulation of the attorneys for the respective parties.

Dated Aug. 7th, 1926.

A. F. ST. SURE,
United States District Judge. [296]

[Endorsed]: Receipt of copy of the within proposed bill of exceptions is hereby admitted this 4 day of May, 1926.

GEO. J. HATFIELD,
Attorneys for Plaintiff.

Lodged May 4, 1926.
Filed Aug. 7, 1926. [297]

[Title of Court and Cause.]

PETITION FOR WRIT OF ERROR (JOSEPH E. MARRON).

Now comes, Joseph E. Marron, the defendant in the above-entitled action, through his attorneys, Hugh L. Smith, Esq., and Charles J. Wiseman, Esq., and feeling himself aggrieved by the judgment of the above-entitled court, made and entered herein on the 28th day of April, 1926, wherein and whereby this defendant was sentenced to pay a certain money and to be imprisoned, as set forth in the judgment made and entered by the Court in said cause, to which judgment reference is hereby made for greater particularity; and your Petitioner show that he was advised by counsel and they aver that there was and is manifest error in the records and proceedings had in said cause and in the making, rendition and entry of said judgment and sentence to the great injury and damage of your petitioner, all of which errors will be more fully made to appear by an examination of said record and by examinations of the bill of exceptions and assignment of errors filed herein and presented herewith and to that end thereafter that the said judgment, sentence, and proceedings may be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, and now pray that a writ of error may be issued directed therefrom to said Southern Division of the District Court of the United States, [298]

for the Northern District of California, returnable according to law and the practice of court, and that there will be directed to be returned, pursuant thereto, a true copy of the record, bill of exceptions, assignment of errors, and all proceedings had in said cause; that the same may be removed to the United States Circuit Court of Appeals, for the Ninth Circuit, to the end that the errors, if any have appeared, may be corrected, and full and speedy justice may be done to your petitioner, and during the pendency of this writ of error, all proceedings in this court may be suspended, stayed and superseded until the final determination of said writ of error. That during the pendency of said writ of error the defendant, Joseph E. Marron, be admitted to bail in such sum as to this Honorable Court may seem meet and proper in the premises.

Dated: May 4, 1926.

HUGH L. SMITH and
CHAS. J. WISEMAN,
Attorneys for Defendant, Joseph E. Marron.

[Endorsed]: Filed May 4, 1926. [299]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now comes defendant, Joseph E. Marron, in the above-entitled cause, and in connection with his petition for a writ of error, herein makes the

following assignment of errors which he avers occurred upon the trial of said cause, to wit:

1.

The Court erred in refusing to grant an order directing the jury to return a verdict of not guilty in respect to the defendant, Joseph E. Marron, to which ruling of the Court said defendant then and there duly and regularly excepted.

2.

The Court erred in rendering judgment and in imposing sentence upon the defendant, Joseph E. Marron, for the reason that said judgment and sentence and the verdict of the jury herein upon which said judgment and verdict were based, were not supported by evidence introduced herein; to which ruling of the Court said defendant then and there duly and regularly excepted.

3.

That there was no evidence adduced, and none appears in the record, showing that the defendant, Joseph E. Marron, at any time or place, and particularly at or in the City and County of San Francisco, Southern Division of the Northern District of California, and within the jurisdiction of the above-entitled Court, on or about the first day of May, 1923, or thereafter up to and including October 3d, [300] 1924, or otherwise or at all combined, confederated and conspired, or combined or confederated or conspired or agreed with each other or with any of the defendants named in said indictment, or all of said defendants named in

said indictment, or with any person or persons, or otherwise or at all wilfully, unlawfully, feloniously and knowingly did any or all of the acts, or each or any of them, as set forth in the indictment on file herein, to which said indictment reference is hereby made, and the allegations, and each of them, are hereby referred to as if they were expressly incorporated herein.

4.

The Court erred in not granting the following motions made on behalf of the defendant, Joseph E. Marron, and prior to the time of the trial of said cause, which said motions were made on the 19th day of April, 1926, and which said motions are as follows: [301]

[Title of Court and Cause.]

PETITION FOR RETURN OF PROPERTY AND TO SUPPRESS EVIDENCE (MOTION "A.")

To the Honorable JOHN S. PARTRIDGE, Judge of the District Court of the United States in and for the Northern District of California:

The petition of Joseph E. Marron respectfully shows:

I.

That at all of the times herein mentioned Samuel Rutter was the duly qualified and acting Prohibition Director of the State of California.

II.

That on or about the 2d day of October, 1924, a Federal Prohibition Agent, acting under and pur-

suant to the authority of the said Samuel Rutter, made and executed an affidavit, a copy of which is hereto attached and made a part hereof, marked Exhibit "A," which said affidavit prayed that a search-warrant be issued to search the premises commonly known and designated as No. 1249 Polk Street, in the City and County of San Francisco, State of California. [302]

III.

That on or before the said 2d day of October, 1924, Albert M. Hardie, a United States Commissioner in and for the Northern District of California, issued a purported search-warrant to search said premises described as aforesaid, a copy of which said search-warrant is hereto attached, made a part hereof, and marked Exhibit "B."

IV.

That on or about the said 2d day of October, 1924, pursuant to the authority conferred upon them in said search-warrant the said Samuel Rutter, through F. W. Whittier and other Federal Prohibition Agents whose names are unknown to your petitioner, entered the said premises known as No. 1249 Polk Street, in the said City and County of San Francisco, State of California, and seized and carried away therefrom certain personal property, to wit: certain papers, records, books of account and ledgers, which were and are the private and personal property of your petitioner.

V.

That your petitioner, Joseph E. Marron, was, on

said 2d day of October, 1924, and at all of the times herein mentioned the lessee and occupant of the premises known as No. 1249 Polk Street, San Francisco, California.

VI.

That said search and said seizure, as aforesaid, was and is in direct violation of your petitioner's constitutional rights under the Fourth and Fifth Amendments to the Constitution of the United States of America, for the following reasons, to wit:

a. The seizure of the said papers, records, books of account and ledgers, was done in contravention of the rights of your petitioner under the Fourth Amendment to the Constitution of the United States of America, for the reason that said papers, records, [303] books of account and ledger were not particularly described in the search-warrant as things to be seized, as required by the said Amendment.

b. The said papers, records, books of account and ledger were not instruments or fruits of crime, but, on the contrary, were and are the private memoranda, the private property and the private papers, documents and writings of your petitioner.

c. The said purported search-warrant only authorizes the said Federal Prohibition Agents, as aforesaid, to search the said premises as aforesaid, for the following described pesonal property, to wit,

> Intoxicating liquor, to wit, alcohol, brandy, wine, whiskey, rum, gin, beer, ale, porter, sherry wine, port wine, jackass brandy, corn whiskey, wine of pepsin, neuropin, pepsin rennin, fermented grape juice and spirituous, vinous, malt

and fermented liquors, liquids and compounds by whatever name called containing one-half of one per centum or more of alcohol and fit for use for beverage purposes, stills, worms, coils, mashes, goosenecks, hydrometers, essences, caramel, coloring materials, boilers.

d. The said Federal Prohibition Agents above referred to, were at the time of executing the warrant, as aforesaid, unlawfully upon the premises and were at said time and said place trespassers in taking the said papers, records, books of account and ledger.

e. The said papers, records, books of account and ledger were not upon the person of your petitioner, but on the contrary were located in the said premises hereinabove referred to.

f. There was neither identification of the said papers, records, books of account and ledger, nor probable cause alleged in the affidavit marked Exhibit "A" in this petition, for the [304] seizure of the papers, records, books of account and ledger, and that their taking was illegal and void.

VII.

That your petitioner is informed and believes and therefore alleges that the United States Government proposes to and will, unless restrained by this Honorable Court, use said personal property seized as aforesaid, as evidence against your petitioner in the trial of the above-entitled action.

WHEREFORE your petitioner prays that an order be made forthwith directing the return of said personal property hereinabove described and set

forth, and that all matters pertaining thereto, and all things or matters discovered as a result of the entries of private matters contained therein be excluded as evidence.

JOSEPH E. MARRON,
Petitioner.
CHARLES J. WISEMAN and
HUGH L. SMITH,
Attorneys for Petitioner. [305]

State of California,
City and County of San Francisco,—ss.

Joseph E. Marron, being first duly sworn, deposes and says: That he is the petitioner in the above and foregoing petition for return of property and to suppress evidence; that he has read said petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to those matters, he believes it to be true.

JOSEPH E. MARRON.

Subscribed and sworn to before me this 16th day of April, 1926.

[Seal] JOHN WISNOM,
Notary Public in and for the City and County of San Francisco, State of California. [306]

EXHIBIT "A."

United States of America,
Northern District of California,
County of Alameda,—ss.

On this 1st day of Oct., 1924, before me, Albert M. Hardie, a United States Commissioner in and

for the Northern District of California personally appeared C. A. Howard, who being first duly sworn, deposes and says:

That he is and at all of the times herein mentioned was a Federal Prohibition Agent and as such makes this affidavit and presents the facts and circumstances hereinafter set out that heretofore came to the personal knowledge of and as positively known to affiant to exist. That this affidavit is made for the purpose of having issued hereon and hereunder a search-warrant to search the following-described premises and place, to wit:

1249 Polk St., San Francisco, Cal., including the entire second floor, flat or club, all rooms, lockers, closets, safes, shelves, sheds, drawers, basement, attic, pantries, cupboards, ice-boxes. Entire premises, name of owner, or occupant, Eddie Marron.

That in and upon the aforesaid premises and place and on or about the 22d day of Sept., 1924, intoxicating liquor as defined by Section 1 of Title II of the Act of October 28, 1919, known as the National Prohibition Act, containing one-half of one per centum or more of alcohol by volume and fit for use for beverage purposes, was then and there and now are kept, sold, possessed and bartered in violation of Title II of the said National Prohibition Act, and particularly in violation of Section 3 and 21 of said Title II.

That affiant on or about the 22d day of September, 1924, visited the above and foregoing mentioned and described premises and purchased from the person in charge in said premises certain intoxicating liquor, to

wit: fifteen drinks of Bourbon whiskey for which he paid fifty cents each; description of person in charge of premises; height, 5 ft. 7 in.; weight, about 165 lbs.; age, 47 years; large nose, deep set eyes; slightly gray hair, high cheek bones; male.

That it will be necessary to enter the said premises and place to search the same and every part thereof in order to secure the said intoxicating liquor therein for the United States Government and that it will be impossible to secure the same or any part thereof without the aid and use of a search-warrant.

WHEREFORE, affiant applies for and prays that a search-warrant to enter the said premises and place and therein to search for the said intoxicating liquor be issued pursuant to the statute in such cases made and provided.

C. A. HOWARD.

Subscribed and sworn to before me this 1st day of October, 1924.

ALBERT M. HARDIE,
United States Commissioner in and for the Northern District of California. [307]

EXHIBIT "B."

To the Federal Prohibition Director in and for the State of California, and to His Assistants, Agents and Inspectors and Any or Either of Them, GREETING:

WHEREAS, C. A. HOWARD, a Federal Prohibition Agent, was as such Agent, on the 1st day of Oct., 1924, by me, Albert M. Hardie, as United

States Commissioner in and for the Northern District of California, at Oakland, California, first duly sworn, and by me as such Commissioner examined on his oath as to all the facts and circumstances personally known to said Agent, respecting the violations of the Act of October 28, 1919, known as the "National Prohibition Act," and referred to in the affidavit hereto attached, and

WHEREAS, the said Agent thereafter and heretofore, to wit, on the said last-mentioned date made and filed with me as such Commissioner his affidavit, which said affidavit is hereto attached marked Exhibit "A" and by reference made a part hereof to all intents and purposes the same as if herein in this warrant set out in full, and

WHEREAS, the said examination and affidavit was had and made for the purpose of having issued thereunder and thereon a search-warrant to search the premises described in said affidavit for the property mentioned and described therein, and

WHEREAS, from the said examination and facts set out in said affidavit, I, ALBERT M. HARDIE, as such Commissioner, being thereupon and therefrom satisfied of the existence of the grounds of the application and that there is probable cause to believe that the grounds of and upon which the application is based, do exist, I find that there is probable cause for the issuance of this warrant; that the particular grounds and probable cause for the issuance of this search-warrant are the facts and circumstances set out in the affidavit of C. A. HOWARD hereto attached and made a part hereof as hereinabove set out.

NOW, THEREFORE, pursuant to Section 25 of Title II of the said National Prohibition Act, you are hereby authorized and empowered to enter the premises and place mentioned, referred to and described in said affidavit, and every part thereof, in the day or night time and to thoroughly search the same for the following described property, to wit: Intoxicating liquor, to wit, alcohol (jackass brandy, corn whiskey, wine of pepsin, neuropin, pepsin rennin, fermented grape juice), brandy, wine, whiskey, rum, gin, beer, ale, porter, sherry wine, port wine, and spirituous, vinous, malt and fermented liquors, liquids and compounds by whatever name called containing one-half of one per centum or more of alcohol and fit for use for beverage purposes, stills, worms, coils, mashes, goosenecks, hydrometers, essences, caramel, coloring materials, boilers, and if found to seize the same and take it into your possession to the end that the said property may be thereafter dealt with according to law, and hereof to make due return with written inventory of the property taken by you or any or either of you, within ten days, as required by law.

WITNESS my hand and official seal this 1st day of October, 1924.

ALBERT M. HARDIE,
United States Commissioner in and for the Northern District of California. [308]

[Endorsed]: Filed April 17, 1926.

Minutes of the Court—April 20th, 1926—Order Denying Petitions to Exclude Evidence.

This cause came on regularly for hearing on vari-

ous petitions to return property and to suppress evidence. After hearing Hugh L. Smith and Chas. J. Wiseman, Attorneys for Defendant, and Edgar T. Bonsall, Asst. U. S. Attorney, ordered petitions for return of property and to suppress evidence denied, to which order the said attorneys for the defendant duly and regularly entered their exception. [309]

[Title of Court and Cause.]

PETITION FOR RETURN OF PROPERTY AND TO SUPPRESS EVIDENCE (MOTION B.)

To the Honorable District Court of the United States, in and for the Northern District of California:

The petition of Joseph E. Marron respectfully shows:

I.

That at all of the times herein mentioned Samuel Rutter was the duly qualified and acting Prohibition Director of the State of California.

II.

That on or about the 2d day of October, 1924, a Federal Prohibition Agent, acting under and pursuant to the authority of the said Samuel Rutter, made and executed an affidavit, a copy of which is hereto attached and made a part hereof, marked Exhibit "A," which said affidavit prayed that a search-warrant be issued to search the premises commonly known and designated as No. 1249 Polk Street, in the City and County of San Francisco, State of California.

III.

That on or about the said 2d day of October, 1924, Albert [310] M. Hardie, a United States Commissioner in and for the Northern District of California, issued a purported search-warrant to search said premises described as aforesaid, a copy of which said search-warrant is hereto attached, made a part hereof, and marked Exhibit "B."

IV.

That on the 2d day of October, 1924, Samuel Rutter, as the duly qualified and acting Prohibition Director for the State of California, through his agent, W. F. Whitter, and other Prohibition Agents, whose names are unknown to your petitioner, entered the premises known as No. 1249 Polk Street, San Francisco, California, and carried away therefrom certain personal property, including among other things, certain papers, records and books of account, which said papers, records and books of account are the private and personal property of your petitioner, Joseph E. Marron; that at the time of said seizure of said personal property, said prohibition agents were acting upon what purported to be a search-warrant lawfully issued, authorizing the search of said premises for certain specified and described property, which did not include the papers, records and account books, hereinabove described.

V.

That said purported search-warrant only authorized the said prohibition agents to search the

said premises for the following described property to wit:

> Intoxicating liquor, to wit, alcohol, brandy, wine, whiskey, rum, gin, beer, ale, porter, sherry wine, port wine, jackass brandy, corn whiskey, wine or pepsin, neuropin, pepsin rennin, fermented grape juice and spirituous, vinous, malt and fermented liquors, liquids and compounds by whatever name called containing one-half of one per centum or more [311] of alcohol and fit for use for beverage purposes, stills, worms, coils, mashes, goosenecks, hydrometers, essences, caramel, coloring materials, boilers.

That the said seizure by the said prohibition agents of that portion of the personal property seized on said 2d day of October, 1924, to wit, said papers, records, and books of account, was unlawful, unreasonable and unwarranted and when said prohibition agents seized said property they became trespassers *ab initio* on said premises of your petitioner, Joseph E. Marron, and therefore the seizure of the personal property authorized to be seized under and by virtue of said purported search-warrant became unlawful.

VI.

That said search and said seizure, as aforesaid, was and is in direct violation of your petitioner's constitutional rights under the Fourth and Fifth Amendments to the Constitution of the United States of America, for the following reasons, to-wit:

a. The seizure of the said papers, records, books of account and ledgers, was done in contravention of the rights of your petitioner under the Fourth Amendment to the Constitution of the United States of America, for the reason that said papers, records, books of account and ledger were not particularly described in the search-warrant as things to be seized, as required by the said amendment.

b. The said papers, records, books of account and ledger were not instruments or fruits of crime but on the contrary were and are the private memoranda, the private property and the private papers, documents and writings of your petitioner.

c. The said purported search-warrant only authorizes the said Federal Prohibition Agents, as aforesaid, to search the said premises as aforesaid, for the following described personal property, to wit:

> Intoxicating liquor, to wit, alcohol, brandy, wine, [312] whiskey, rum, gin, beer, ale, porter, sherry wine, port wine, jackass brandy, corn whiskey, wine of pepsin, neuropin, pepsin rennin, fermented grape juice and spirituous, vinous, malt and fermented liquors, liquids and compounds by whatever name called containing one-half of one per centum or more of alcohol and fit for use for beverage purposes, stills, worm, coils, mashes, goosenecks, hydrometers, essences, caramel, coloring materials, boilers.

d. The said Federal Prohibition Agents, above referred to, were at the time of executing the war-

rant, as aforesaid, unlawfully upon the premises and were at said time and said place trespassers in taking the said papers, records, books of account and ledger.

e. The said papers, records, books of account and ledger were not upon the person of your petitioner, but on the contrary were located in the said premises hereinabove referred to.

f. There was neither identification of the said papers, records, books of account and ledger, nor probable cause alleged in the affidavit marked Exhibit "A" in this petition, for the seizure of the papers, records, books of account and ledger, and that taking was illegal and void.

VII.

Petitioner is informed and believes, and therefore alleges that the United States Government proposes to use said personal property as evidence against your petitioner in a conspiracy action now pending.

WHEREFORE, petitioner prays that an order be made directing the return of said property seized on the 2d day of October, 1924, that all matters pertaining thereto and all things or matters discovered as a result thereof be suppressed as evidence.

JOSEPH E. MARRON,
Petitioner.
CHARLES J. WISEMAN,
HUGH L. SMITH,
Attorneys for Petitioner. [313]

State of California,
City and County of San Francisco,—ss.

Joseph E. Marron, being first duly sworn, deposes and says: That he is the petitioner in the above and foregoing petition for return of property and to suppress evidence; that he has read said petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to those matters, he believes it to be true.

JOSEPH E. MARRON.

Subscribed and sworn to before me this 16th day of April, 1926.

[Seal] JOHN WISNOM,
Notary Public in and for the City and County of San Francisco, State of California. [314]

EXHIBIT "A."

United States of America,
Northern District of California,
County of Alameda,—ss.

On this 1st day of Oct., 1924, before me, Albert M. Hardie, a United States Commissioner in and for the Northern District of California personally appeared C. A. Howard who being first duly sworn, deposes and says:

That he is and at all of the times herein mentioned was a Federal Prohibition Agent and as such makes this affidavit and presents the facts and circumstances hereinafter set out that heretofore

came to the personal knowledge of and as positively known to affiant to exist. That this affidavit is made for the purpose of having issued hereon and hereunder a search-warrant to search the following described premises and place, to wit:

1249 Polk St., San Francisco, Cal., including the entire second floor, flat or club, all rooms, lockers, closets, safes, shelves, sheds, drawers, basement, attic, pantries, cupboards, iceboxes. Entire premises, name of owner, or occupant, Eddie Marron.

That in and upon the aforesaid premises and place and on or about the 22d day of Sept., 1924, intoxicating liquor as defined by Section I of Title II of the Act of October 28, 1919, known as the National Prohibition Act, containing one-half of one per centum or more of alcohol by volume and fit for use for beverage purposes, was then and there and now are kept, sold, possessed and bartered in violation of Title II of the said National Prohibition Act, and particularly in violation of Section 3 and 21 of said Title II.

That affiant on or about the 22d day of September, 1924, visited the above and foregoing mentioned and described premises and purchased from the person in charge in said premises certain intoxicating liquor, to wit: Fifteen drinks of Bourbon whiskey for which he paid fifty cents each; description of person in charge of premises: Height, 5 ft. 7 in.; weight about 165 lbs.; age 47 yrs.; large nose, deep set eyes; slightly gray hair, high cheeks bones; male. That it will be necessary to enter the said premises and place to search the same and every

part thereof in order to secure the said intoxicating liquor therein for the United States Government and that it will be impossible to secure the same or any part thereof without the aid and use of a search-warrant.

WHEREFORE, affiant applies for and prays that a search-warrant to enter the said premises and place and therein to search for the said intoxicating liquor be issued pursuant to the statute in such cases made and provided.

C. A. HOWARD.

Subscribed and sworn to before me this 1st day of October, 1924.

ALBERT M. HARDIE,
United States Commissioner in and for the Northern District of California. [315]

EXHIBIT "B."

To the Federal Prohibition Director in and for the State of California, and to His Assistants, Agents and Inspectors and Any or Either of Them, GREETING:

WHEREAS, C. A. HOWARD a Federal Prohibition Agent, was as such Agent on the 1st day of Oct., 1924, by me, Albert M. Hardie, as United States Commissioner in and for the Northern District of California, at Oakland, California, first duly sworn, and by me as such Commissioner examined on his oath as to all the facts and circumstances personally known to said Agent, respecting the violations of the Act of October 28, 1919,

known as the "National Prohibition Act" and referred to in the affidavit hereto attached, and

WHEREAS, the said Agent thereafter and heretofore, to wit, on the said last mentioned date made and filed with me as such Commissioner his affidavit, which said affidavit is hereto attached marked Exhibit "A" and by reference made a part hereof to all intents and purposes the same as if herein in this warrant set out in full, and

WHEREAS, the said examination and affidavit was had and made for the purpose of having issued thereunder and thereon a search-warrant to search the premises described in said affidavit for the property mentioned and described therein, and

WHEREAS, from the said examination and facts set out in said affidavit, I, ALBERT M. HARDIE, as such Commissioner, being thereupon and therefrom satisfied of the existence of the grounds of the application and that there is probable cause to believe that the grounds of and upon which the application is based, do exist, I find that there is probable cause for the issuance of this warrant; that the particular grounds and probable cause for the issuance of this search-warrant are the facts and circumstances set out in the affidavit of C. A. HOWARD hereto attached and made a part hereof as hereinabove set out.

NOW, THEREFORE, pursuant to Section 25 of Title II of the said National Prohibition Act, you are hereby authorized and empowered to enter the premises and place mentioned, referred to and described in said affidavit, and every part thereof, in

the day or night time and to thoroughly search the same for the following described property, to wit: Intoxicating liquor, to wit, alcohol, (jackass brandy, corn whiskey, wine of pepsin, neuropin, pepsin rennin, fermented grape juice) brandy, wine, whiskey, rum, gin, beer, ale, porter, sherry wine, port wine, and spirituous, vinous, malt and fermented liquors, liquids and compounds by whatever name called containing one-half of one per centum or more of alcohol and fit for use for beverage purposes, stills, worms, coils, mashes, goosenecks, hydrometers, essences, caramel, coloring materials, boilers, and if found to seize the same and take it into your possession to the end that the said property may be thereafter dealt with according to law, and hereof to make due return with written inventory of the property taken by you or any or either of you, within ten days as required by law.

WITNESS my hand and official seal this 1st day of October, 1924.

ALBERT M. HARDIE,
United States Commissioner in and for the Northern District of California. [316]

[Endorsed]: Filed April 17, 1926.

Minutes of the Court—April 20th, 1926—Order Denying Petitions to Exclude Evidence.

This cause came on regularly for hearing on various petitions to return property and to suppress evidence. After hearing Hugh L. Smith and Chas. J. Wiseman, Attorneys for defendant, and Edgar T. Bonsall, Asst. U. S. Attorney, ordered

petitions for return of property and to suppress evidence denied, to which order the said attorneys for the defendant duly and regularly entered their exception. [317]

[Title of Court and Cause.]

PETITION FOR RETURN OF PROPERTY AND TO SUPPRESS EVIDENCE (MOTION "D").

To the Honorable JOHN S. PARTRIDGE, Judge of the District Court of the United States in and for the Northern District of California:

The petition of Joseph E. Marron respectfully shows:

I.

That at all of the times herein mentioned Samuel Rutter was the duly qualified and acting Prohibition Director of the State of California.

II.

That on or about the 2d day of October, 1924, a Federal Prohibition Agent, acting under and pursuant to the authority of said Samuel Rutter, made and executed an affidavit, a copy of which said affidavit is attached to the petition filed herein designated as petition "A," the Court's attention being respectfully directed to said petition for the full contents of said affidavit, which said affidavit prayed that a search-warrant be issued to search the premises commonly known and designated as No. 1249 Polk Street, in the City and County of San [318] Francisco, State of California.

III.

That on or about the 2d day of October, 1924, Albert M. Hardie, a United States Commissioner in and for the Northern District of California, issued a purported search-warrant to search said premises described as aforesaid, a copy of which said warrant is attached to petition "A" referred to in the foregoing paragraph, the attention of the Court being respectfully directed to said petition "A" for the full contents of said search-warrant.

IV.

That on or about the said 2d day of October, 1924, pursuant to the authority conferred upon them in said search-warrant the said Samuel Rutter through F. W. Whittier and other Federal Prohibition Agents whose names are unknwon to your petitioner, entered the said premises known as No. 1249 Polk Street, in the said City and County of San Francisco, State of California, and seized and carried away therefrom certain personal property, to wit: Certain papers, records, books of account and ledgers, which were and are the private and personal property of your petitioner.

V.

That your petitioner, Joseph E. Marron, was, on said 2d day of October, 1924, and at all of the times herein mentioned, the lessee and occupant of the premises known as No. 1249 Polk Street, San Francisco, California.

VI.

That said search and said seizure, as aforesaid,

was and is in direct violation of your petitioner's constitutional rights under the Fourth and Fifth Amendments to the Constitution [319] of the United States of America, for the following reasons, to wit:

2. The seizure of the said papers, records, books of account and ledgers, was done in contravention of the rights of your petitioner under the Fourth Amendment to the Constitution of the United States of America, for the reason that said papers, records, books of account and ledger were not particularly described in the search-warrant as things to be seized, as required by the said Amendment.

b. The said papers, records, books of account and ledger were not instruments or fruits of crime, but, on the contrary, were and are the private memoranda, the private property and the private papers, documents and writings of your petitioner.

c. The said purported search-warrant only authorizes the said Federal Prohibition Agents, as aforesaid, to search the said premises as aforesaid, for the following described personal property, to wit:

> Intoxicating liquor, to wit, alcohol, brandy, wine, whiskey, rum, gin, beer, ale, porter, sherry wine, port wine, jackass brandy, corn whiskey, wine of pepsin, neuropin, pepsin rennin, fermented grape juice and spirituous, vinous, malt and fermented liquors, liquids and compounds by whatever name called containing one-half of one per centum or more of alcohol and fit for use for beverage purposes, stills,

worms, coils, mashes, goosenecks, hydrometers, essences, caramel, coloring materials, boilers.

d. The said Federal Prohibition Agents, above referred to, were at the time of executing the warrant, as aforesaid, unlawfully upon the premises and were at said time and said place trespassers in taking the said papers, records, books of account and ledger. [320]

e. The said papers, records, books of account and ledger were not upon the person of your petitioner, but, on the contrary, were located in the said premises hereinabove referred to.

f. There was neither identification of the said papers, records, books of account and ledger, nor probable cause alleged in the affidavit hereinbefore referred to as having been set out in petition "A" filed herein, for the seizure of the papers, records, books of account and ledger, and that their taking was illegal and void.

g. That at the time the said Prohibition Agent served said warrant and seized said papers, records, books of account and ledger they failed and neglected to conform to the requirements of said search-warrant, in this:

1. That they failed to make due return with written inventory of the property so taken (i. e., papers, records, books of account and ledger) within ten days as required by law, or at all.

2. That they failed and neglected to comply with the requirement of said search-warrant as set forth in Section 25, Title 2 of said National Prohibition Act and Section 12, Title 11, of the Espionage Act

(Comp. St. 1918; Comp. St. Ann. Supp. 1919, Sec. 10496¼ L) by failing to give a receipt of the property taken (i. e., papers, records, books of account and ledger) specifying it in detail to the person from whom it was taken or in whose possession it was found; or, in the absence of any person at the time of the service of said warrant, in leaving said receipt for said property where the property was found.

h. That the failure of said agents, or either of them, to comply with the said requirements of said search-warrant as hereinabove [321] set out rendered all proceedings thereunder, and particularly that portion with respect to the seizure of said papers hereinabove enumerated, void, and all evidence obtained thereby inadmissible.

i. That attached hereto and marked Exhibit "A" is an exact copy of the return made by said Prohibition Agent Whittier on said warrant hereinabove referred to.

VII.

That your petitioner is informed and believes and therefore alleges that the United States Government proposes to and will, unless restrained by this Honorable Court, use said personal property seized as aforesaid as evidence against your petitioner in the trial of the above-entitled action.

WHEREFORE, your petitioner prays that an order be made forthwith directing the return of said personal property hereinabove described and set forth, and that all matters pertaining thereto, and all things or matters discovered as a result of the

entries of private matters contained therein, be excluded as evidence.

JOSEPH E. MARRON,
Petitioner.
CHARLES J. WISEMAN and
HUGH L. SMITH,
Attorneys for Petitioner. [322]

State of California,
City and County of San Francisco,—ss.

Joseph E. Marron, being first duly sworn, deposes and says: That he is the petitioner in the above and foregoing petition for return of property and to suppress evidence; that he has read said petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to those matters he believes it to be true.

JOSEPH E. MARRON.

Subscribed and sworn to before me this 16th day of April, 1926.

JOHN WISNOM,
Notary Public in and for the City and County of San Francisco, State of California. [323]

EXHIBIT "A."

RETURN ON SEARCH-WARRANT.

Returned, this 2 day of October, 1924. Served by making search as within directed, upon which search I found:

16 pint bottles champagne.
9—1/5 gal. bottles white wine.

5—1/5 gal. bottle whiskey.
2—quart bottle whiskey.
1—1/5 gal. bottle gin 3/4 full.
1—1/5 gal. bottle full gin.
2 bottles Bacardi rum.
1—1/5 gal. bottle brandy.
2—1/5 gal. bottle Scotch whiskey.
1—1/5 gal. bottle 1/2 full Scotch whiskey.
1 bottle vermouth.
1 bottle picon 1/3 full.
1—1-gal. bottle 3/4 full gin.
8 bottles sweet wine.
1 bottle 1/3 full whiskey.
1—1-gal. bottle full sweet wine.
2 sacks Canadian beer.
174 bottles home brew beer.

And duly inventoried the same as above, according to law.

W. F. WHITTIER.

I, W. F. Whittier, the officer by whom this warrant was executed, do swear that the above inventory contains a true and detailed account of the property taken by me on the warrant.

W. F. WHITTIER.

Subscribed and sworn to before me this —— day of ——, 1924.

_____,

United States Commissioner, Northern District of California. [324]

[Endorsed]: Filed April 17, 1926.

Minutes of the Court—April 20th, 1926—Order Denying Petitions to Exclude Evidence.

This cause came on regularly for hearing on various petitions to return property and to suppress evidence. After hearing Hugh L. Smith and Chas. J. Wiseman, Attorneys for Defendant, and Edgar T. Bonsall, Asst. U. S. Attorney, ordered petitions for return of property and to suppress evidence denied, to which order the said attorneys for the defendant duly and regularly entered their exception. [325]

5.

The Court erred in admitting into evidence over the objection of the defendant, Joseph E. Marron, and refusing to strike from the record on motion of the said defendant the following testimony:

"Direct Examination.

(By Mr. BONSALL.)

I testified in this case once before. My position with the Government at that time was Federal Prohibition Agent. I had been such agent for a year or a year and a half, or something like that. I believe I was present at a raid at 1249 Polk Street, on or about October 2, 1924. I think Agents Lee, Howard and Eldridge were with me at that time. We had a search-warrant for the place. We found liquor at that time. I could not tell you what we found. I don't remember what we found. We found assorted liquors—everything, I think. I think there was some beer there.

(The attention of the witness was here directed to page 17 of the transcript of the previous trial for the purpose of refreshing his memory concerning the subject matter of his present testimony.)

The WITNESS.—(Continuing.) Yes, there is whiskey mentioned here. I remember the champagne, too. There was champagne there. We found champagne there. That was in a trap in the closet in one of the front rooms. I don't remember whether there were a dozen or half a dozen bottles of champagne. If I testified in the former trial that there was 16 pint bottles there, I guess that is so.

I am not now in the employ of the Government. I won't state as to whether there was white wine there. I think there was both port wine and sherry wine, if I remember right. There was such an assortment. There were two or three boxes of it. There was a lot of home brew, too. I remember the home brew because one of them exploded. I believe there was whiskey there. There was a considerable number of bottles. I think there was gin and Bicarde rum. I don't remember any brandy. I don't remember in my former testimony [326] that I said that there was one one-fifth gallon bottle of brandy. There was Scotch whiskey. I do not remember any vermouth. There was a bottle of Pecan. There was port and sherry and home brew. There was some Canadian beer—two sacks of Canadian beer and 174 bottles of home brew. That was in boxes. That is what exploded.

EXCEPTION No. ——.

Mr. SMITH.—Now, may it please the Court, so that our record may be protected in this matter, I am going to ask that all of that testimony be stricken out on the ground that that is not the proper way to refresh the memory of this particular witness; and also upon the ground that it is immaterial, irrelevant and incompetent, for the reason that at the time the officer was on the premises he was acting under a warrant; and in addition to seizing the articles suggested by the Court, he also seized some books, papers and memoranda not described in the warrant, and that in so doing he exceeded his authority, and, therefore, became a trespasser *ab initio,* and that all of his acts at that time upon those premises are inadmissible as evidence in this particular case.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

The WITNESS.—(Continuing.) To Mr. Bonsall: I made a thorough search of the place at that time. I went through all the rooms. They had tables in them. There was a couch or davenport. I don't know just what you would call it, in one of the front rooms; chairs; I don't remember whether there was a room that one of the men claimed was his room, or not. I won't say for sure whether there was a bed in there, or not. I am telling you how it was furnished. I am giving my best memory of the matter. I burned my records when I left the Government service. I wanted to forget all of it. There was a bedroom there that

I think one of the men there claimed was his. Now, I won't say for sure, I don't *remember* [327] *there* was a bed, one of these folding beds, in there or not. I think he stated that that was his room. That was off to the rear of the kitchen, or the serving-room. There was a serving-room. I would call it a serving-room. That was in the rear of the kitchen. There was not any bar that you stand up to, if that is what you mean. There was nothing of that kind. I would not state whether there was one there or not. I think it was Birdsall who was in charge of the premises on October 2, 1924. He was one of the co-conspirators named in this case prior to this trial. There were a lot of people in there at that time. I should say there were a dozen people in there. Some of them were sitting in one room and some in another. The principal thing they were doing when I got there was that they were trying to get out.

Mr. BONSALL.—Didn't you testify at the last trial regarding these people that you saw in the premises at the time you entered?

The WITNESS.—(Continuing.) I am just telling you that when I was in there there were some women in one room, and there was a girl with a squirrel fur coat in another room with a chap, and they all wanted to get out. We had to hold them in there to question them as to what they were doing.

(The attention of the witness was directed to page 22 of the Transcript of the previous trial for

the purpose of refreshing his recollection as to what happened at that time.)

The WITNESS.—(Continuing.) That is what I said, a dozen men and women. The transcript of my previous testimony says that they were drinking. They were not drinking when I was in there. There was something on the table, but they were not drinking. According to that transcript I testified at the last trial that they were drinking. I cannot remember that that is a correct statement. It was a year and one-half or two years ago that happened. I don't remember it. I saw a bottle on the table; if I remember right, it was whiskey. [328] I took the bottle and brought it in as evidence. The transcript of the testimony I gave at the former trial, page 22, says it was whiskey. The bottle was there and the glasses were there and these people were sitting there, that is, they were sitting there until I came in. I found a book on those premises at 1249 Polk Street, in the City and County of San Francisco, on the 2d day of October, 1924, besides the liquor."

The basis of the objection being set out in the above motion to strike, which said motion was denied. To which ruling of the Court the said defendant then and there duly and regularly excepted.

6.

The Court erred in overruling the objection interposed by the defendant to the following questions propounded to the witness Whittier on his direct examination by counsel for plaintiff:

"Q. I show you this book and ask you if you have ever seen this book before.

Mr. SMITH.—Just a second, before we get any testimony with respect to that book.

The COURT.—Were any arrests made at that time? A. Yes, sir.

Q. Who was arrested? A. Birdsall.

The COURT.—The objection is overruled.

Mr. SMITH.—We note an exception.

The WITNESS.—(Continuing.) I saw that book, I think, in the closet in the front room. There was champagne in there besides the book. There was some money in there in the same closet where this book was found. I don't remember whether the money was on the top of this book or underneath the book. There was a lot of greenbacks. I am not sure whether the money was loose in the closet or whether it was in a container. I don't know whether it was. I think it was in [329] a cigar-box. There was considerable currency in the cigar-box, but it went out of the cigar-box. While we were searching there it was taken out."

The basis of the objection on the part of the defendant, Marron, being fully set out in the motions to suppress and exclude evidence, and designated "A," "B" and "D." To which ruling of the Court the defendant then and there duly and regularly excepted.

7.

The Court erred in admitting into evidence over the objection of the defendant the following testimony given by the witness Whittier:

"Mr. BONSALL.—Q. I didn't ask you anything about that; I only asked you if there was considerable money in that cigar-box at the time you saw it there?

Mr. SMITH.—We object to that as immaterial, irrelevant and incompetent, and it would not tend to prove anything anyway, even if there was considerable money there.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

The WITNESS.—(Continuing.) I don't know how much or whether it was 20's, or 10's, or 5's; I saw it and went to tell Birdsall to come and get it, and in the meantime it disappeared. I think I asked Birdsall something about the book and threw it over on the table in the rear room. No; I didn't ask him about the book. I asked him about his name. He gave me the name of Howard at first. I told him it was not Howard; it was Birdsall."

To which ruling of the Court the defendant then and there duly and regularly excepted.

8.

The Court erred in overruling the objection interposed by the defendant to the following questions propounded to the witness Whittier on his direct examination by counsel for plaintiff: [330]

"Q. I call your attention to page 23 of your testimony at the last trial and I will ask you if that helps you with your recollection as to whether Birdsall said anything about that book or not.

Mr. WISEMAN.—If the Court please, we object to that upon the ground it is immaterial, irrelevant

and incompetent; and on the further ground that any statement made by Birdsall would be hearsay so far as Marron is concerned until a conspiracy is established.

A. I think that the statement was made and that Howard—

Mr. SMITH.—Just a moment. May that answer go out until the Court rules on our objection?

The COURT.—Yes, it may go out. I presume the District Attorney intends to connect up this testimony by proof tending to show a conspiracy.

Mr. BONSALL.—Yes, your Honor, I do.

The COURT.—Objection overruled.

Mr. SMITH.—Exception. And upon the further ground that if a conspiracy existed at all it is presumed to have come to an end at the time of the arrest. Birdsall was then arrested. If he made any statement after he was arrested that evidence would be only binding on himself, and it would be hearsay as to the defendant Marron.

The COURT.—I think your statement may be correct, but we have just started the trial. I don't know that there has been any proof of conspiracy yet.

Mr. BONSALL.—No, your Honor, I can't prove everything at once.

Mr. WISEMAN.—But they admit that Birdsall was arrested at the time. That is clear.

The COURT.—Yes, Birdsall was arrested at the time the book was taken. That stands very clearly in the record. I will overrule the objection.

Mr. WISEMAN.—Exception.

The WITNESS.—(Continuing.) I believe Birdsall at that time said [331] something about leaving the book on those premises at 1249 Polk Street, San Francisco."

To which ruling of the Court the defendant duly and regularly excepted.

9.

The Court erred in admitting into evidence over the objection of the defendant the following document, to wit, U. S. Exhibit No. 1, entitled a ledger:

"Mr. BONSALL.—Before proceeding any further with the evidence of this witness, I will make a formal offer in evidence of this little gray ledger.

Mr. SMITH.—To which we object, if the Court please, on all the grounds set forth in our petition, and on all the grounds urged yesterday.

The COURT.—Objection overruled.

Mr. SMITH.—Exception. May all of the objections that were interposed in the various motions filed with your Honor be considered as having been made at this time to the introduction of this book?

The COURT.—Yes."

To which ruling of the Court the defendant duly and regularly excepted.

10.

The Court erred in overruling the objection interposed by the defendant to the following questions propounded to the witness Whittier on direct examination by counsel for the plaintiff:

"Q. Did any of that conversation refer to who was the owner of that place?

Mr. SMITH.—We object to any conversation with the defendant Birdsall on the ground that the conspiracy, in so far as the present condition of the record shows, terminated upon the arrest of the defendant Birdsall and any statements made by him after his arrest [332] would be binding only on himself, if the Court please, upon the theory that the conspiracy, if one existed, had come to a termination.

The COURT.—Your idea is that this offense was a continuing one, is it?

Mr. BONSALL.—Yes, your Honor, following the theory in the Nan Patterson case. In these large conspiracies, some acts may take place after the arrest.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

A. Yes, I had a conversation with him.

Mr. BONSALL.—Q. Did he say who was the owner? A. Yes.

Q. Who did he say was the owner of the place?

A. Himself.

Mr. SMITH.—Without the necessity of repeating objections, may our entire objection *to* run to all of this testimony?

The COURT.—I presume it would be just as well to have that understanding, because it will save time.

Mr. BONSALL.—Q. Do you recall if Mr. Birdsall mentioned Mr. Marron's name at that time?

Mr. SMITH.—That is objected to on the further

ground that it is leading, as well as upon all of the other grounds heretofore urged.

The COURT.—Objection overruled.

Mr. SMITH.—Exception."

To which ruling of the Court the defendant duly and regularly excepted.

11.

The Court erred in overruling the objections interposed by the defendant to the following questions propounded to the witness Whittier on his direct examination:

"Mr. BONSALL.—Q. I show you these five papers that are fastened together, and, without commenting on them, I ask you did you ever see them before?

A. I remember four of them. I guess they are the [333] same ones. I remember four of them.

Q. Which four do you remember?

A. The water bill, and—

Mr. SMITH.—Just a second, I would like to interpose the objection at this time to any interrogation regarding these papers upon all of the grounds I have heretofore urged with respect to the introduction of Exhibit 1 of the Government—I assume that that is the number that has been given to the book, is it?

Mr. BONSALL.—Yes, Exhibit 1.

Mr. SMITH.—And upon the further ground that there has been no *prima facie* case of conspiracy established at this time, and that, therefore, any interrogation concerning these papers would be improper.

The COURT.—Objection overruled.

Mr. SMITH.—Exception."

To which ruling of the Court the defendant duly and regularly excepted.

12.

The Court erred in not granting the motion made on behalf of the defendant to strike from the record the answer given to the following question:

"Mr. BONSALL.—Q. I show you this document and without comment I ask you whether you have seen that before.

A. I remember a gas and electric bill. There was a gas and electric bill, and there was a Spring Valley water bill, and there was a bill from some rattan place, the Coulter Rattan place, and, if I am not mistaken, a telephone bill.

Q. Is not this the bill that you identified heretofore on the previous trial of this case?

A. I suppose it is, but I don't know where this bill has been.

Mr. SMITH.—I ask that that answer go out as not being responsive. [334]

The COURT.—Motion denied.

Mr. SMITH.—Exception."

To which ruling of the Court the defendant duly and regularly excepted.

13.

The Court erred in admitting into evidence over the objection of the defendant the following testimony given by the witness Whittier.

"Mr. BONSALL.—Q. Did you find a telephone

bill at No. 1249 Polk Street, made out to Eddie Marron, for $11.84? A. Did I find it?

Q. Was it found there?

Mr. SMITH.—Now, just a second. We object to that question, if the Court please, as immaterial, irrelevant and incompetent, and not binding on the defendant Marron, and as clearly hearsay as to him.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

Mr. BONSALL.—Q. Will you answer the question, Mr. Whittier?

A. One of the agents found a bill; I don't remember whether I did or who it was. One of us found it.

Mr. SMITH.—I ask that that go out as not responsive.

The COURT.—Motion denied.

Mr. SMITH.—Exception.

Mr. BONSALL.—Q. Did you see it found?

A. It was brought in afterwards and laid down in front of all of us.

Mr. SMITH.—I ask that that go out as not responsive.

The COURT.—Motion denied.

Mr. SMITH.—Exception."

To which ruling of the Court the defendant duly and regularly *accepted.* [335]

"Q. You testified at the last trial, in January, 1925, with reference to these bills, did you not?

A. I don't remember.

Q. If you did so testify, the statements that you made at that time were true, were they not?

A. As far as I remember.

Mr. SMITH.—Just a second. I ask that the answer go out for the purpose of making an objection. I object to that as immaterial, irrelevant and incompetent, and that it is not the proper way to refresh the memory of the witness.

The COURT.—Objection overruled. We are trying to save time here, Counsel.

Mr. SMITH.—I appreciate that, your Honor, but we cannot disregard the established rules of evidence in order to save time. We note an exception.

The WITNESS.—(Continuing.) These are the papers that were found at 1249 Polk Street. Here is the Spring Valley Water Company bill and here is the telephone bill. I am certain that these identical papers were introduced as evidence, as Plaintiff's Exhibit No. 33, at the last trial. I think they were found around the cash register, if I am not mistaken. The cash register was in the kitchen; what you would call the kitchen of the flat. One of them, I think, was alongside the cash register. I could not say offhand which was alongside the cash register. My recollection is refreshed when you tell me that it was the check. I remember it was the check. I don't remember whether I had a conversation with Mr. Birdsall regarding any of these documents at the time of the raid. I will have to look at the transcript again. After I found these papers I accused Mr. Birdsall. I think I asked

him, at least, if Mr. Marron did not own the place, and he stated no, that he owned it."

To which ruling of the Court the defendant then and there duly and regularly excepted. [336]

14.

The Court erred in admitting into evidence, over the objection of the defendant, U. S. Exhibit No. 2, being a Pacific Gas & Electric bill.

"Mr. SMITH.—To which, of course, we object on all the grounds heretofore urged, and upon the further ground that it is nothing but pure hearsay, and that no *prima facie* case of conspiracy has yet been established.

The COURT.—Objection overruled.

Mr. SMITH.—Exception."

To which ruling of the Court the defendant then and there duly and regularly excepted.

15.

The Court erred in admitting into evidence, over the objection of the defendant, U. S. Exhibit No. 3, being a bill for water.

"Mr. SMITH.—May the same objection be considered as made to that?

The COURT.—It may. Objection overruled.

Mr. SMITH.—Exception."

To which ruling of the Court the defendant duly and regularly excepted.

16.

The Court erred in admitting into evidence, over the objection of the defendant, U. S. Exhibit No. 4, being a Pacific Telephone & Telegraph Co. bill.

"Mr. SMITH.—May the same objection be considered as having been made to the introduction of this particular exhibit?

The COURT.—Yes. Objection overruled.

Mr. SMITH.—And may the same objection be considered as having been made heretofore, and on the further ground that it is hearsay and not binding on the defendant Marron, and that it is immaterial, irrelevant and incompetent? [337]

The COURT.—Objection overruled.

Mr. SMITH.—Exception."

To which ruling of the Court the defendant then and there duly and regularly excepted.

17.

The Court erred in admitting into evidence, over the objection of the defendant, U. S. Exhibit No. 5, being a bill rendered by the Coulter Rattan Works.

"Mr. SMITH.—The same objection is interposed to the introduction of this exhibit upon all the grounds heretofore urged to the others.

The Court.—Objection overruled.

Mr. SMITH.—Exception."

To which ruling of the Court the defendant then and there duly and regularly excepted.

18.

The Court erred in admitting into evidence, over the objection of the defendant, U. S. Exhibit No. 6, being a receipt issued by the Pacific Telephone & Telegraph Co.

"Mr. SMITH.—May the same objection be considered as having been made to this?

The COURT.—Yes. Objection overruled.

Mr. SMITH.—Exception."

To which ruling of the Court the defendant then and there duly and regularly excepted.

19.

The Court erred in admitting into evidence, over the objection of the defendant, U. S. Exhibit No. 7, being a receipt issued by the Spring Valley Water Co. for the sum of $2.80.

"Mr. SMITH.—The same objection.

The COURT.—Objection overruled."

To which ruling of the Court the defendant then [338] and there duly and regularly excepted.

20.

The Court erred in overruling the objection interposed by the defendant to the following question:

"Mr. BONSALL.—Q. Did you take samples of any of the liquors you found at 1249 Polk Street at that time?

Mr. SMITH.—We object to the question as leading, and as immaterial, irrelevant and incompetent, and there has been no *prima facie* case of conspiracy made out as yet. We object to it upon the ground that it is immaterial, irrelevant and incompetent, and upon all of the grounds heretofore urged in the various motions submitted to your Honor.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

A. Yes."

To which ruling of the Court the defendant then and there duly and regularly excepted.

21.

The Court erred in admitting into evidence, over the objection of the defendant, U. S. Exhibit No. 8, being five slips of paper; and in permitting the witness Whittier to give testimony thereon.

"Q. I show you these slips and ask you if you have ever seen them before? I will also show you the envelope they were in. A. Yes.

Q. Where did you find those slips?

Q. When did you first see these papers?

A. I will have to look at that transcript again, I can't remember.

Q. I will show it to you in this printed copy of the transcript on appeal, Mr. Whittier; this was prepared by counsel at the time of the appeal.

Mr. BONSALL.—I think this will save time.

Q. Does this refresh your recollection as to the matter? A. Yes. [339]

Q. Does that aid you in fixing the date when you first saw these slips?

A. Yes. I think those were in that book.

Q. On October 2, 1924? A. Yes, sir.

Q. At 1249 Polk Street? A. Yes, sir.

Q. In what book were they?

A. The gray ledger.

Q. You mean United States Exhibit No. 1 on this trial? A. Yes, sir.

Mr. BONSALL.—'Sept. 28 Bill Windler $10. Birdsall $20; September 8, Birdsall $50. September 18, Change $100; Marron $60; Slot machine $30. Col. Bevin $5., September 21, 1924.' These five slips of paper with longhand writing on them are

now offered in evidence as Government's Exhibit 8.

(Thereupon the documents were introduced in evidence as United States Exhibit No. 8.)

Said exhibit was and is in the following words and figures, to wit:

(Here insert exhibit.)

Mr. SMITH.—We object on all the grounds heretofore urged, and on the ground that they are immaterial, irrelevant and incompetent, and not in the handwriting of the defendant, and, therefore, they are not binding upon him; on the further ground that there has been no *prima facie* case of conspiracy established.

The COURT.—Objection overruled.

Mr. SMITH.—Exception."

To which ruling of the Court the defendant then and there duly and regularly excepted.

22.

The Court erred in admitting into evidence, over the objection of the defendant, U. S. Exhibit No. 9, and in permitting counsel for plaintiff over the objection of the defendant to read to the jury the contents of said exhibit, the full substance of which is set out in the following: [340]

"Mr. BONSALL.—Q. I show you this paper and ask you if you ever saw that before? A. Yes, sir.

Q. Where did you find that?

Mr. SMITH.—Let us get the date first.

Mr. BONSALL.—Q. When did you find it?

A. October 2, 1924.

Q. Where did you find it?

A. In that gray book.

Q. At 1249 Polk Street, in the City and County of San Francisco, California? A. Yes, sir.

Mr. BONSALL.—I will now offer this statement in evidence. I will read it to the jury at this time.

Mr. SMITH.—To which, of course, we object, may it please the Court, upon all of the grounds heretofore urged with respect to the other papers and documents that were seized, upon the ground that it is hearsay as to the defendant Marron; upon the further ground that no *prima facie* case of conspiracy has been as yet established, and that it is inadmissible as evidence for the reasons heretofore urged.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

Mr. BONSALL.—This reads as follows: 'September 1924. Sales 5624.50. Sales Cigars 5.65. Sales Slof Machines 254.00 Total receipts 5884.15. Cost of Goods sold 331.60. Gross Profit 2552.55. Expenses Salaries 840.00. Rent 100.00. XXXXX 170.00. Janitor 30.00. Miscellaneous 155.95. New Furniture 69.50. Total Expenses 1365.45. 1187.10. E. M. 600.00. Profits after All Salaries & Expenses $587.10. E. M. proportion 293.55. G. B. proportion 293.55

'George B. Salary 600.00. George B. ½ above 293.55. George B. 893.55. George B. has drawn 430.00. George B. has coming 443.55.,"

To which ruling of the Court the defendant then and there duly [341] and regularly excepted.

23.

The Court erred in admitting into evidence, over the objection of the defendant, U. S. Exhibits Nos. 10, 11, 12, 13 and 14, being bottles, and in permitting the witness Whittier to testify in regard thereto.

"Mr. SMITH.—Now, your Honor, so that we might conserve time, may the objection that I have offered to all of the evidence, documentary and otherwise, that has been heretofore introduced, be considered as being renewed at this time to all of the evidence concerning these exhibits?

The COURT.—You are now referring to the liquor, are you?

Mr. SMITH.—To this bottle.

The COURT.—Very well. The objection is overruled.

Mr. SMITH.—Exception."

The basis of the objection on the part of the defendant Marron being that said evidence was unlawfully obtained, as will more fully appear by reference to the motions filed herein and designated "A," "B," and "D."

To which ruling of the Court the defendant then and there duly and regularly excepted.

24.

The Court erred in admitting into evidence, over the objection of the defendant, the following testimony:

"Mr. BONSALL.—I want to ask the Court's indulgence, in view of what the testimony has been, to ask a leading question of this witness.

Q. Were there any slot machines found there?

Mr. SMITH.—We object to that as highly improper and is asked only for the purpose of prejudicing the defendant. He is not charged here with violating any law prohibiting the use of slot machines. [342]

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

A. Yes.

Mr. BONSALL.—Q. How many slot machines were there there?

Mr. SMITH.—The same objection.

The COURT.—Objection overruled.

Mr. SMITH.—Exception."

To which ruling of the Court the defendant then and there duly and regularly excepted.

25.

The Court erred in sustaining the objection made by counsel for the plaintiff to the following question:

"Q. (Mr. SMITH.) While you were at 1249 Polk Street everything you did while there you did under and by virtue of the authority vested in you by that warrant?

Mr. BONSALL.—The warrant speaks for itself. The return speaks for itself. I object to the question as immaterial, irrelevant and incompetent.

The COURT.—It calls for the conclusion of the witness. The objection is sustained.

Mr. SMITH.—Exception."

To which ruling of the Court the defendant then and there duly and regularly excepted.

26.

The Court erred in sustaining the objection made by counsel for the plaintiff to the following question propounded on behalf of the defendant Marron.

"Mr. SMITH.—Q. Mr. Whittier, at the time that you seized these bottles that have been introduced in evidence, did you seize those bottles under your general authority as a prohibition agent, or did you seize those bottles under and by virtue of the special authority [343] vested in you by this warrant and granted to you by the warrant?

Mr. BONSALL.—Just a moment. The return on the search-warrant speaks for itself.

The COURT.—Objection sustained.

Mr. SMITH.—Exception."

To which ruling of the Court the defendant then and there duly and regularly excepted.

27.

The Court erred in sustaining the objection made by counsel for the plaintiff to the following question propounded on behalf of the defendant Marron:

"Mr. SMITH.—Q. Mr. Whittier, at the time you seized Plaintiff's Exhibit No. 1 and the other papers and memoranda that have been introduced in evidence here and marked U. S. Exhibits 2 to 9, were you acting under and by virtue of the authority granted you in this warrant or were you acting under your general authority as a prohibition agent?

Mr. BONSALL.—We object to that as calling for the conclusion of the witness, and as immaterial,

irrelevant and incompetent, and the warrant speaks for itself.

The COURT.—Objection sustained.

Mr. SMITH.—Exception."

To which ruling of the Court the defendant then and there duly and regularly excepted.

28.

The Court erred in sustaining the objection made by counsel for the plaintiff to the following question propounded on behalf of the defendant Marron.

"Mr. SMITH.—Q. Mr. Whittier, at the time you took the book and the papers that I have heretofore referred to, did you at any time ever make a return to a United States Commissioner showing that you [344] had seized those books and papers under that warrant?

Mr. BONSALL.—Again I submit that the return on the search-warrant speaks for itself?

The COURT.—Objection sustained. As I understand it, this book was seized by virtue of the search-warrant.

Mr. SMITH.—I think we ought to have the testimony of the witness on that."

To which ruling of the Court the defendant then and there duly and regularly excepted.

29.

The Court erred in permitting counsel for the plaintiff, over the objection of the defendant, to read to the jury the contents of Plaintiff's Exhibit No. 1, being a ledger.

"Mr. BONSALL.—I will now read Government's Exhibit No. 1 in evidence.

Mr. SMITH.—Now, your Honor, so that we might conserve time, may the objections that I have offered to all of the evidence, documentary and otherwise, that has been heretofore introduced, be considered as being renewed at this time to all of the evidence concerning these exhibits?

The COURT.—Very well, the objection is overruled.

Mr. SMITH.—Exception."

Counsel for plaintiff thereupon read from Plaintiff's Exhibit No. 1 at great length, covering pages 21, 31, 36, 46, 54, 61, 69, 75, 81, 87, 93, 94, 105, 107, 34, 51, 60, 68, 74, 80, 92, 98, 104, 8, 86, 123, 101, 71 and 64.

To which ruling of the Court the defendant then and there duly and regularly excepted.

30.

The Court erred in admitting into evidence over the objection of the defendant Marron the following testimony given by the witness [345] G. L. Lee:

"Mr. SMITH.—Now, your Honor, so that we might conserve time, may the objections that I have offered to all of the evidence, documentary and otherwise, that has been heretofore introduced, be considered as being renewed at this time to all of the evidence?

The COURT.—Very well, the objection is overruled.

Mr. SMITH.—Exception.

(By Mr. BONSALL.)

My occupation at the present time is a salesman. I was formerly employed as a federal prohibition

agent. From February 5, 1924, to October 19, 1925. I recall while such prohibition agent visiting the premises 1249 Polk Street, on the 2d day of October, 1924, in the City and County of San Francisco, State of California. I went there with the agents Whittier and Eldridge and the driver Carmona. The driver rang three bells which was supposed to be the signal to get in, three bells at the front door. We had a search-warrant. Those premises are on the west side of Polk Street, near Bush. We entered through the front door and went up a flight of stairs. It is a flat of, I guess, six or seven rooms, about seven rooms. On entering we all went upstairs. I went to the rear of the premises, in what used to be the kitchen. There was no stove or anything in the kitchen. There we found in the ice-chest—There was not any stove in the kitchen. There was no furniture there. There were no beds in the place. There was a davenport, I believe, in the front room. I saw the davenport later. There were tables and chairs. Slot machines and a cash register. Two slot machines that I remember of. I made a thorough search of the premises. I did particularly the kitchen, that end of the house. I inspected the back porch. There were no stairs, from the back porch directly into the back yard, and no stairs up. To go to the back porch you had to go through these premises. [346]

Q. What did you find on the back porch?

Mr. SMITH.—We object to that as assuming something not in evidence.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

The WITNESS.—(Continuing.) We found I don't know how many thousands of empty bottles, liquor bottles, beer, and whiskey, and so on. I found intoxicating liquors on those premises on October 2, 1924. I found some in the ice-chest and some in the pantry, what used to be the pantry. It was whiskey and wine, and gin, and Canadian Rainier beer. I have not got the quantity I found there now, but there was quite a quantity, though. I am familiar with the taste of whiskey, but I don't think I tasted any of that. I knew from the smell that it was whiskey. I did not taste any of the wine. I smelled the wine. From my experience I would say that it was intoxicating wine, and the same with the whiskey.

The attention of the witness was here directed to Government's Exhibits 12, 10, 14 and 13 and 11 for identification.

The witness thereupon identified these exhibits.

The WITNESS.—(Continuing.) The liquor I found came from the ice chest and the pantry at 1249 Polk Street, in the City and County of San San Francisco, State of California.

These bottles were labeled in my presence. Eldridge made the labels and they were taken to the United States Chemist. I did not search the front room of those premises.

Mr. SMITH.—That is leading and suggestive.

Mr. BONSALL.—It may be, but I am trying to save time.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

The WITNESS.—(Continuing.) After I was there on the raid some [347] little time I went to the front room and saw a trap in the closet. I saw the book that is now in evidence as U. S. Exhibit No. 1, but at the time I entered the premises, if I remember right, there were at least five or six people in the place. Some were in the rooms. I don't remember seeing anybody drinking, though. I would not say whether they were drinking or not. I don't remember whether there were any glasses on the tables, when I was there, because I went directly to the kitchen and came in afterwards. The other agents went into the front room."

To which ruling of the Court the defendant then and there duly and regularly excepted.

31.

The Court erred in admitting into evidence over the objection of the defendant the following testimony given by the witness Fred Carmona:

"(By Mr. BONSALL.)

Q. Do you recall driving to the premises at 1249 Polk Street in the City and County of San Francisco, State of California, on October 2, 1924?

Mr. SMITH.—Now, just a second. We object to the question upon the ground that it is leading. While it is true that some questions might be overlooked because of the fact that they are leading or suggestive. I think that the objection properly applies to this question, because it is putting the answer that is desired right into the mouth of the witness.

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The COURT.—Objection overruled. I don't think that that will do any harm to the defendant.

Mr. SMITH.—Exception.

A. I don't recall just exactly what date it was, but I do remember that I drove the raiding squad to those premises at about that time.

Mr. SMITH.—I move to strike that out as not responsive. [348]

The COURT.—Motion denied.

Mr. SMITH.—Exception.

The WITNESS.—(Continuing.) Agents Lee, Whittier and Howard were with me. I went into the premises. They sent me up to give the usual signal, whatever it was, which I did, and the other agents were one on one side and one on the other side. The signal was so many bells. I rang the bell so many times."

To which ruling of the Court the defendant then and there duly and regularly excepted.

32.

The Court erred in not granting the motion made on behalf of the defendant Marron to strike from the record all of the testimony given by the witness Carmona.

"Cross-examination.

(By Mr. SMITH.)

A. I didn't keep any record of the date, or any notes on it at all. I don't know just exactly what date it was. As far as I know, it may have just as well been October 3d as October 2d.

Mr. SMITH.—In view of the statement of the witness, your Honor, I ask that all of his testimony be stricken from the record.

The COURT.—Motion denied.

Mr. SMITH.—Exception."

To which ruling of the Court the defendant then and there duly and regularly excepted.

33.

The Court erred in admitting into evidence over the objection of the defendant Marron the following testimony given by witness George E. Eldridge:

Mr. SMITH.—Now, your Honor, so that we might conserve time, may the objections that I have offered to all of the evidence, documentary and otherwise, that has been heretofore introduced, be [349] considered as being renewed at this time to all of the evidence?

The COURT.—Very well, the objection is overruled.

Mr. SMITH.—Exception.

(By Mr. BONSALL.)

I was formerly a Federal Prohibition Agent; from the 25th of August, 1924, to the 20th day of July, 1925. I had occasion to go to the premises at 1249 Polk Street, in the City and County of San Francisco, State of California, in the month of October, 1924. On the second day of October, I went there with Agents Whittier, Lee and Howard. We had a search-warrant for those premises. We went up there and the signal was given and we were admitted and went upstairs and searched the place and found quite a quantity of liquor. I went to

the back porch and found a great many empty bottles. I don't know if I smelled them or not. I don't remember. They were all kinds of bottles. I don't know how many there were. There were too many to count. There was not a stairway leading up and down from the back porch. I had to go through the premises to reach the rear porch. As I remember it, there were two rooms across the front and two rooms across the back, and two rooms connecting them on the side. One of the front rooms was furnished with overstuffed furniture, but I am not clear as to what was in the other room. In the back rooms, one was fixed up as a kitchen and the other more or less as a dining-room, I should say. The two connecting rooms had a small amount of furniture in them. I did not see any beds. At the time I was there there were some guests and some slot machines; four slot machines, I believe. I don't know how many people were there at the time of the raid. I don't believe I made a note of it. I was in there on two days. I am not sure how many people were there on the first day. There were people in there. There were some refreshments in front of them. I don't know if it was intoxicating liquor. I did not taste it. [350] I did not smell it. Not the stuff that was gotten in front of them. I don't recall the color. It was being served in glasses. Not whiskey glasses. They were tall glasses. They looked like a two-ounce glass instead of the usual one-ounce glass. I found liquor on the premises. There was some in the ice-box in the kitchen, some

in the closet in the kitchen, some in a closet in the hall, and some in a trap in a closet in the front room.

Not any on the back porch that I recall. I have a list of the quantity that we found there.

Q. Will you read it?

A. 16 pint bottles champagne; 9 one-fifth gallon bottles white wine—

Mr. SMITH.—Just a minute. We submit that the search-warrant that is in evidence is the best evidence of what was found.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

A. (Continuing.) 16 pint bottles champagne; 9 one-fifth gallon bottles white wine; 5 one-fifth gallon bottles whiskey; 2 one quart bottles whiskey; 1 one-fifth bottle gin three-quarters full; 1 one-fifth gallon bottle gin full; 2 bottles Bicarde run; 1 one-fifth gallon bottle brandy; 2 one-fifth gallon bottles Scotch whiskey; 1 one-fifth gallon bottle one-half full Scotch whiskey; 1 bottle vermuth; 1 bottle pecan, one-third full; 1 one-gallon bottle three-quarters full gin; 8 bottles sweet wine; 1 bottle one-third full whiskey; 1 gallon bottle one-sixth full sweet wine; 2 sacks Canadian beer; 3 cases of home brew.

I smelled the liquor that was there. I smelled some whiskey. I am familiar with the smell of whiskey. I would say that it was intoxicating liquor. The beer and the whiskey. I know from my past experience that there were both beer and

whiskey. There [351] were samples taken on the premises.

The attention of the witness was directed to the five bottles marked Government's Exhibits 11, 10, 12, 14 and 13, for identification.

The WITNESS.—(Continuing.) These are the bottles that were found there. They were labeled by me and taken to the United States Chemist. I found champagne there. I was not in the room when the champagne was found. There was a trap there. I have the champagne listed in my book.

Mr. BONSALL.—Q. Calling your attention to United States Exhibit 1, did you see that on that day? A. Yes, sir.

Q. In those premises? A. Yes, sir.

I am testifying, now, as to the first visit on October 2d, 1924. I have not my notes here about the 3d."

To which ruling of the Court the defendant then and there duly and regularly excepted.

34.

The Court erred in admitting into evidence over the objection of the defendant Marron the following testimony given by the witness Edward O. Vaughn:

"Mr. SMITH.—Now, your Honor, so that we might conserve time, may the objections that I have offered to all of the evidence, documentary and otherwise, that has been heretofore introduced, be considered as being renewed at this time to all of the evidence?

The COURT.—Very well, the objection is overruled.

Mr. SMITH.—Exception.

(By Mr. BONSALL.)

My business is that of an accountant. I have been such for about 20 years. I know Mr. Birdsall, one of the co-conspirators in this case. I have known him 12 or 15 years, I should say. In the first part of January and the first part of the year 1924, [352] I think I had occasion to visit 1249 Polk Street, in the City and County of San Francisco, State of California. I believe it was in the early part of 1924. I saw Birdsall at that time."

To which ruling of the Court the defendant then and there duly and regularly excepted.

35.

The Court erred in admitting into evidence over the objection of the defendant Marron the following testimony given by the witness Vaughn:

"(By Mr. BONSALL.)

Q. Did you have any talk with him with reference to the accounts that he was keeping there at that time?

Mr. SMITH.—We object to that as immaterial, irrelevant and incompetent and not binding on the defendant Marron.

The COURT.—What date was it?

Mr. BONSALL.—In the early part of 1924.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

The WITNESS.—(Continuing.) Yes, I had a talk with him at the time that I was there.

Mr. BONSALL.—Q. What did he ask you to do?

Mr. SMITH.—We object to that as assuming something that is not in evidence.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

A. We discussed adding up the book."

To which ruling of the Court the defendant then and there duly and regularly excepted.

35.

The Court erred in admitting into evidence over the objection of the defendant Marron the following testimony given by the witness [353] Vaughn:

"Mr. BONSALL.—I show you Government Exhibit No. 1 and without comment ask you to state if you recognize that book. You may look inside it.

Mr. SMITH.—So that our record may be complete on this matter, if the Court please, and so that I will not unnecessarily delay matters with objections, I object to all testimony elicited from this witness with respect to United States Exhibit No. 1. May the objection be considered as made at this time that was heretofore made, all of the objections made orally, and all of the objections contained in our petitions to suppress?

The COURT.—Yes. The objection is overruled.

Mr. SMITH.—Exception.

A. I have seen it before.

Q. Now, without comment, I show you this sheet

of paper marked U. S. Exhibit 9, and ask you if you have ever seen that before.

Mr. SMITH.—The same objection, your Honor.

The COURT.—I understand it goes to all the evidence.

Mr. SMITH.—It goes to all the documentary evidence.

The COURT.—Yes, all that was handed to this witness.

Mr. SMITH.—Yes, your Honor.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

A. Yes, sir.

The WITNESS.—(Continuing.) I know whose handwriting that is. That is my handwriting. I presume the entries on Government's Exhibit No. 9 are made from the book. That is my recollection. I must have gotten the figures from the book. Not all of the entries in Government's Exhibit No. 9 are in my handwriting. I would have to go through the book. I might have put some totals in here from time to time. Mr. Birdsall employed me at the time I came there to [354] summarize the book and the figures. That is not the book he employed me to keep. No, I never was employed to make entries in the book but to add up the book and make a summary, to prepare a statement of profit from the book. I would have to check the figures back. I will have to refer to this to find out what month I started keeping the accounts or making the summaries from this book, because I don't recall. I see some fig-

ures in my writing at the end of January. I presume 1924. September of that year seems to be the last. On page 86 of the Ledger, at the top of the page, the name of 'Mis.' is given. I am not sure whether there is a page in there with the name of Vaughn on it.

Q. Here it is. It is right on page 86.

A. I thought you said up at the top. The entry is 'Vaughn $10.' I wrote that, and I was paid the $10 for the services I rendered. I notice on page 81 three 'X's,' opposite which are the figures '170.'"

To which ruling of the Court the defendant then and there duly and regularly excepted.

36.

The Court erred in admitting into evidence over the objection of the defendant Marron the following testimony given by the witness Vaughn:

"(By Mr. BONSALL.)

Q. Will you explain to the jury the significance of the meaning of those three cross-marks?

Mr. SMITH.—We object to that as calling for the opinion and conclusion of the witness, and as assuming something that is not in evidence. This witness has not testified that they signify or mean anything.

The COURT.—Objection overruled. You can state, if you know.

Mr. SMITH.—Exception.

The WITNESS.—(Continuing.) There were certain items there [355] that we put together and marked an 'X' opposite that. The items that went to make up the 170 opposite the three cross-marks

I believe they were called gifts and police items entered in the details. Gifts and police. That is my recollection. I presume they are the same items marked in that book 'Kissane' and 'Police.' There are some little check-marks here that I have checked off and I think they total up that item."

To which ruling of the Court the defendant then and there duly and regularly excepted.

37.

The Court erred in admitting into evidence over the objection of the defendant Marron the following testimony given by the witness Vaughn:

"Mr. BONSALL.—Q. Did you have any instructions from Mr. Birdsall with reference to making up that particular item?

Mr. SMITH.—We object to that on the ground that if he did have any such instructions they would not be binding on the defendant Marron.

The COURT.—Objection overruled.

Mr. SMITH.—Exception."

To which ruling of the Court the defendant then and there duly and regularly excepted.

38.

The Court erred in admitting into evidence over the objection of the defendant Marron the following testimony given by the witness Vaughn:

"The WITNESS.—(Continuing.) I have had instructions, otherwise I would have summarized them under those various headings. I don't recall those instructions. I was told to make them in one lump sum; that would be my recollection, now. I was not given any reason why they were shown

that way. On page 87 of Government's [356] Exhibit 1, some of that is in my handwriting. The summary on that page is in my handwriting. All of it, I believe is. I notice in that summary appears three cross-marks with the figures 195. They are in my handwriting. I see some checks in the month of June accounts that indicate that I checked them off, making that 170. Those items would be the same kind of items, Kissane and Police and Gifts. I notice the summary on page 94 for the month of July, 1924. That is in my handwriting. There are four cross-marks on page 94, with 180 written opposite them. I presume the same kind of items went to make up that 180. They were all handled the same way every month. I presume when I say the same kind of items I mean 'Gifts,' 'Kissane,' 'Police.' The summary for the month of August on page 101 is in my handwriting. I notice in that summary there appears an item with three cross-marks, and the sum of $180 opposite them. Undoubtedly that is made up from like items—'Kissane,' 'Gifts,' 'Police,' because we were doing the same each month, and the crosses stood, in general, for that kind of entries—'Kissane,' 'Gifts, 'Police.' I notice the summary on page 107 in that ledger, for September, 1924. That is all in my handwriting. On that page appear five cross-marks with the figures 170 opposite them. Those five cross-marks and the sum of $170 represent items 'Kissane,' 'Police,' and 'Gifts' for the month of September made up as the other months were. Government's Exhibit No. 9, which

I have in my hand, is a copy of page 107. It seems to be a copy taken from Exhibit No. 1. I must have copied it from there. It is in my handwriting. I must have copied it from the book. I know of no other place where I could have got it. I could not say that the statement represents a summary of profit and loss for the month of September at 1249 Polk Street, in the City and County of San Francisco, State of California. It is a copy of this summary and the summary was prepared from this book. I was [357] adding up the book when I made it. I didn't write 'summary.' I could not say that in September, 1924, 'sales' refers to sales at 1249 Polk Street. Those items were taken from this ledger. I remember testifying at the last trial.

Mr. BONSALL.—Q. I will read you this question: 'Q. Is that a profit and loss statement? A. Yes, it was intended for that.' Was that statement correct at the time it was made?

A. Yes. It was a profit and loss statement.

Q. For September, 1924? A. Yes.

Q. Now, will you turn to pages 80 and 81 of Government's Exhibit No. 1. At the top of page 80, under date of May 19, 1924, you will find an item, 'Government fine $500.' Then on the opposite page, that is, on page 81, there is written, 'one-half fine $250.' Have you that place? A. Yes.

Q. Is that in your handwriting?

A. On page 81 it is.

Q. Will you tell me what that indicates?

Mr. SMITH.—If he knows.

A. It is under the heading 'Bird'—I suppose that is Birdsall.

The WITNESS.—(Continuing.) I don't know whether that is in reference to the $500 on page 80. I added $250 to his account for some reason, but I cannot recall why. I would think that the $250 is charged to Birdsall—or 'Bird,' as it is stated here. I am an expert accountant.

Q. Can you tell that your statement came from that book?"

To which ruling of the Court the defendant then and there duly and regularly excepted.

39.

The Court erred in admitting into evidence over the objection of the defendant Marron the following testimony given by the witness Vaughn: [358]

"(By Mr. BONSALL.)

Q. Can't you tell that your statement came from that book?

Mr. WISEMAN.—We object to that, your Honor, as immaterial, irrelevant and incompetent, and as an attempt to cross-examine his own witness.

The COURT.—Objection overruled.

Mr. WISEMAN.—Exception.

A. Yes, this statement came from the book."

To which ruling of the Court the defendant then and there duly and regularly excepted.

40.

The Court erred in admitting into evidence over the objection of the defendant Marron the following testimony given by the witness Vaughn:

"(By Mr. BONSALL.)

Q. How would you be able to make a statement of Profit and Loss in the month of September, 1924, without knowing what items you were including in that statement?

Mr. WISEMAN.—The same objection.

Mr. SMITH.—And I think the question assumes something that has not been stated by the witness.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

A. I made the statement from the book, yes. I must have got instructions to charge that under the 'Bird' account; 'One-half $250,' to the name of 'Bird.' I presume from the $500 Government fine. I don't know. I can't remember that. As I recall it, I went there to make up those books around or shortly after the first of the month. Mr. Birdsall was there almost always, when I went there. I talked to Birdsall occasionally about making up these items in the book. I saw defendant, Eddie Marron, there. I [359] believe I used to go in the front room where there was nobody coming in or out, and I would be undisturbed. I don't think that Mr. Birdsall and Mr. Marron both went into that room always. There were times when they were not in that room with me when I was making up that statement. I was in there at the time. Probably there were. That book was given to me to work from when I went there. I suppose Birdsall gave it to me, or if he was not there it may have been left there and I would get it. I don't know that Mr. Birdsall told me to make the balances every month,

but originally Birdsall did. I don't know that he told me that every month. I used to go there for that purpose. Nobody else ever told me to keep up the book. I received instructions regarding keeping that book from Birdsall—all of them. I find in Government Exhibit No. 9, in evidence, that there was an item there, 'Slot machines $254.' I don't know where I got that item to make that figure from. I notice on page 116, from the summary for September, 1924, I used it on the September statement. That is right, the date here. There is an item in Government's Exhibit No. 9, 'Salaries.' I find that item here. That item is $840.00. I believe the salaries in that sheet appear in Government's Exhibit No. 1. I believe they do. The greater part of it. I see an item here 240, leaving $600. It must have been $20 a day salary, charged for Birdsall under that item.

Q. At the time you made up that statement, somebody gave you instructions how much to charge a day for salary for Mr. Birdsall, did they not?

Mr. SMITH.—That is assuming something not in evidence, something that has not been testified to.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

A. Yes, I think Mr. Birdsall told me to charge $20 a day for [360] his salary.

The WITNESS.—(Continuing.) Birdsall's salary was $600.00. I see an item here under the heading 'Charles.' I believe there was a fellow there by that name. I remember Charley Mahoney. I am not sure. I think that was meant for him. I don't

know whether he was one of the co-conspirators in this case. I was present at the last trial.

Q. Did you see this same Charles in the court-room at the last trial?

Mr. SMITH.—We object to that as immaterial, irrelevant and incompetent.

The COURT.—Objection overruled.

Mr. SMITH.—Exception."

To which ruling of the Court the defendant then and there duly and regularly excepted.

41.

The Court erred in admitting into the evidence over the objection of the defendant Marron the following testimony given by the witness Vaughn:

"Mr. BONSALL.—Q. And he was the Charles Mahoney who was employed there? A. Yes, sir.

Q. And he was a defendant at the last trial?

Mr. SMITH.—The same objection.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

A. I believe he was."

To which ruling of the Court the defendant then and there duly and regularly excepted.

42.

The Court erred in not granting the motion made on behalf of the defendant Marron to strike from the record the following [361] testimony:

"(By Mr. BONSALL.)

Q. Referring to Government Exhibit 9, on that statement appear the letters 'E. M.' with the figures

600 opposite them. Do you know what those two letters 'E. M.' refer to?

A. Well, I suppose, E. Marron.

Mr. SMITH.—I ask that that answer go out. He says, 'I suppose.'

The COURT.—Motion denied.

Mr. SMITH.—Exception."

To which ruling of the Court the defendant then and there duly and regularly excepted.

43.

The Court erred in admitting into evidence over the objection of the defendant Marron the following testimony given by the witness Vaughn:

"The WITNESS.—(Continuing.) That is the statement that I drew up. At the time this was going on, when I made these statements, Mr. E. Marron was in there, in and out, he had some dealings there, just what I don't know, and I think that is what that refers to. I don't know that I testified at the last trial regarding that proposition.

Attention was directed to page 119 of the transcript of the previous trial.

The WITNESS.—Well, that is what I have said here. I said at that time that it referred to Eddie Marron. I still make the same statement. If I said it then it must be true now. I don't recall every figure here at this time, a year or so later. If I testified in January, 1925, in this case, it would still be true. No, there is no doubt I said it must refer to Eddie Marron.

I find in Government's Exhibit No. 9, a little further down [362] on that page, the initials

'E. M., proportion $293.55' and continuing further I see the initials 'G. B., proportion $293.55.' E. M. refers to E. Marron, the defendant. G. B. to George Birdsall, one of the defendants in the former trial. I saw him at the last trial and he was a defendant in that trial in January, 1925. The statement shows a profit for the month of $587.10; those two items are 50 per cent each of that. 50% of the profit to Marron and 50% to Birdsall. That is the way the total shown here is divided. Mr. Birdsall must have given me the instructions to divide them that way. I don't recall that he told me anything about how that $600 was to be taken out. I don't recall now just how this is worked out, whether it was to be taken out after expenses had been deducted from the receipts.

The attention of the witness was directed to the transcript, page 120, at the former trial.

Q. Is that correct? A. Yes, sir.

Q. Will you read it to the jury?

A. The question was: 'Q. What did he say with reference to $600, as to whom or where it was to be taken out?' The answer was: 'A. After the expenses had been deducted from the receipts then that amount should be deducted and the balance divided between them.' "

To which ruling of the Court the defendant then and there duly and regularly excepted. [363]

44.

The Court erred in admitting into evidence, over the objection of the defendant Marron the following testimony given by the witness Vaughn:

"Mr. BONSALL.—Q. Will you look at the bottom of page 69 of Government's Exhibit No. 1 in evidence; there is an item on that page that says, 'New police $90.'

Mr. SMITH.—If the Court please, we object to any statement of counsel as to what that is. That matter was a matter of considerable controversy in the last trial.

Mr. BONSALL.—Well, it looks like that.

The COURT.—Counsel says it looks like it. We will let it go at that.

Q. Do you know what it is?

A. I don't recall the item now.

Mr. BONSALL.—Q. Do you remember talking about that item with me just before we came down here? A. Yes.

Mr. WISEMAN.—We object to that, if the Court please, as an attempt to impeach his own witness, as immaterial, irrelevant and incompetent.

The COURT.—Objection overruled.

Mr. WISEMAN.—Exception.

A. I recall that.

The WITNESS.—(Continuing.) I see that item there that looks like 'policy' or 'Police.' It seems to be in my handwriting. It is very poorly written. I think it is my handwriting. I cannot swear whether that is 'New Police,' or 'New Policy,' but it is $90. I recall that item only when I see it there."

To which ruling of the Court the defendant then and there duly and regularly excepted.

45.

The Court erred in admitting into evidence, over the objection of the defendant Marron, the following testimony given by the witness [364] Vaughn:

"Mr. BONSALL.—Q. Where did you transpose in any statement that item 'New policy'?

Mr. SMITH.—We object to that on the ground that it is assuming that is not in evidence, the witness has not testified he ever transposed it.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

The WITNESS.—(Continuing.) This refers to March. I would not swear that that had not been altered since I entered it. I believe the first time I went to that place at 1249 Polk Street was in the early part of 1924. I purchased drinks in that place. I could not say that I never went in there that I did not get a drink. I bought it from whomever was serving it at the time. I recall Birdsall and Mahoney. I bought from them. I continued from March until September, 1924. I don't know how many times I had a drink in that place. I must have been there six or seven times for the purpose of working on the books."

To which ruling of the Court the defendant then and there duly and regularly excepted.

46.

The Court erred in admitting into evidence, over the objection of the defendant Marron, the following testimony given by the witness D. E. Mocker:

"Mr. BONSALL.—Q. Then who did you collect rent from at that address?

A. Just a minute, please. That was up to November 1st.

Q. November 1st, 1923? A. Yes.

Q. Then who did you collect from?

A. Collected under the name of Marron.

Mr. SMITH.—We ask that the answer be stricken out as not responsive. [365]

The COURT.—Motion denied.

Mr. SMITH.—Exception.

The COURT.—Q. The question was, who did you collect from?

A. The receipt is issued under the name of Marron. I generally called there and if they were out they would leave it with somebody. It was very seldom I ever saw anybody the second time. There was always somebody on the premises.

Q. You made the receipt out in the name of Marron? A. Yes, sir.

Q. Just how did you make it out?

A. Marron; no first name, or anything.

Q. Just Marron?

A. Yes. When we called, if Mr. Marron was out he would leave it with somebody else on the premises.

The WITNESS.—(Continuing.) I made the receipt out of the name of Marron. Marron. No first name, or anything; just Marron. When I called if Marron was out, he would leave it for me with someone else on the premises."

To which ruling of the Court the defendant then and there duly and regularly excepted.

47.

The Court erred in not granting the following motion made on behalf of the defendant Marron:

"The COURT.—Q. The question was, who did you collect from?

A. The receipt is issued under the name of Marron. I generally called there and if they were out they would leave it with somebody. It was very seldom I ever saw anybody the second time. There was always somebody on the premises.

Q. You made the receipt out in the name of Marron? A. Yes, sir.

Q. Just how did you make it out?

A. Marron; no first name, or anything.

Q. Just Marron?

A. Yes. When we called, if Mr. Marron was out he would leave it with somebody else on the premises. [366]

Mr. SMITH.—I ask that the evidence be stricken from the record on the ground that it is immaterial, irrelevant and incompetent, and not in any way binding on the defendant Marron now on trial.

The COURT.—Motion denied.

Mr. SMITH.—Exception."

To which ruling of the Court the defendant then and there duly and regularly excepted.

48.

The Court erred in admitting into evidence, over the objection of the defendant Marron, the following testimony given by the witness Edward T. O'Donnell respecting Government's Exhibit No. 4, as follows:

"Mr. SMITH.—Now, your Honor, so that we might conserve time, may the objections that I have offered to all of the evidence documentary and otherwise, that has been heretofore introduced, be considered as being renewed at this time to all of the evidence concerning these exhibits?

The COURT.—Very well, the objection is overruled.

Mr. SMITH.—Exception.

Government Exhibit 4 is not a final, revised bill. That is a bill for the month of October in advance and toll service up to and including the date there specified. I think the final bill was left in court. This document that I have now been shown is a closing statement of the account. The Eddie Marron on account of 1249 Polk Street. This covers exchange service to 10–20–24, $2.58; toll service from 9–21 to 10–16–24, and from 8–21 to 9–20–24; $2.42 and $8.19, making total of $13.19."

To which ruling of the Court the defendant then and there duly and regularly excepted.

49.

The Court erred in admitting into evidence over the objection [367] of the defendant Marron the following testimony given by the witness L. B. Bybee:

"Mr. BONSALL.—Q. What is the best of your recollection as to who you purchased from?

Mr. SMITH.—We object to that on the ground it is immaterial, irrelevant and incompetent. If he has a recollection it is a different story.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

A. To the best of my recollection it was Mr. Eddie Marron."

To which ruling of the Court the defendant then and there duly and regularly excepted.

50.

The Court erred in admitting into evidence, over the objection of the defendant Marron, the following testimony given by the witness Bybee:

"Mr. BONSALL.—Q. This defendant?

Mr. SMITH.—We interpose an objection to the last question on the ground that it is leading and suggestive.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

A. Yes.

Mr. BONSALL.—Did you pay for this liquor?

A. I did."

To which ruling of the Court the defendant then and there duly and regularly excepted.

51.

The Court erred in overruling the objection interposed by the defendant Marron to the following questions propounded to the witness Walter Brand, on his direct examination by counsel for the plaintiff:

"Mr. BONSALL.—Q. Where do you reside?

A. 527 Saxon Ave. [368]

Q. Did you ever occupy the premises at 1249

Polk Street in the City and County of San Francisco in the State of California? A. Yes, sir.

Mr. SMITH.—Just a second, may it please the Court. We object to any testimony from the witness Mr. Brand concerning the premises at 1249 Polk Street for the reason that in the former trial of this case the verdict of the jury in effect decided that Mr. Brand was not a co-conspirator in any sense of the word with Mr. Marron by its verdict of acquittal of the witness Brand. We urge that his activities therein, therefore, have been adjudicated finally, and that any testimony elicited from him concerning that place would be immaterial, irrelevant and incompetent.

The COURT.—Objection overruled.

Mr. SMITH.—Exception."

To which ruling of the Court the defendant then and there duly and regularly excepted.

52.

The Court erred in overruling the objection interposed by the defendant Marron to the following questions propounded to the witness Brand on his direct examination by counsel for the plaintiff:

"Mr. BONSALL.—Q. When did you first take possession of the premises, Mr. Brand?

Mr. SMITH.—We object to that as immaterial, irrelevant and incompetent.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

A. On the 26th day of July, 1923."

To which ruling of the Court the defendant then and there duly and regularly excepted.

53.

The Court erred in overruling the objection interposed by the defendant Marron to the following questions propounded to the [369] witness Brand, on his direct examination by counsel for the plaintiff:

Mr. BONSALL.—Q. From whom did you obtain those premises?

Mr. SMITH.—The same objection.

Mr. WISEMAN.—And on the further ground that it is hearsay so far as the defendant Marron is concerned.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

A. From George Hawkins."

To which ruling of the Court the defendant then and there duly and regularly excepted.

54.

The Court erred in overruling the objection interposed by the defendant Marron to the following questions propounded to the witness Brand on his direct examination by counsel for the plaintiff:

"Mr. BONSALL.—Q. How did you come to buy the place from him?

Mr. WISEMAN.—May the same objections run to the questions propounded to this witness, your Honor?

The COURT.—Yes. Objection overruled.

Mr. SMITH.—And on the further ground that the record does not at this time show any relation whatsoever between the witness Brand and the de-

fendant Marron, there is no *prima facie* case of conspiracy.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

A. I heard it was for sale, and I asked him how much he wanted for it and bought it.

Hawkins wanted $1500 for the place at first. Then he agreed to take $1000. I know the defendant, Eddie Marron. I have known him about 6 or 7 years. Longer than that, probably."

To which ruling of the Court the defendant then and there duly and regularly excepted. [370]

55.

The Court erred in admitting into evidence, over the objection of the defendant Marron, the following testimony given by the witness Brand on his direct examination:

"Mr. BONSALL.—Q. At the time you bought this place, did you borrow any money from him?

A. Yes.

Mr. SMITH.—Just a moment. That is objected to as leading and suggestive.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

The WITNESS.—(Continuing.) I borrowed different amounts at different times from him. First I borrowed $325, and I could buy this place for a thousand dollars and I went and asked him to lend me $1000. I didn't tell him that I was going to buy a place with it. I didn't tell him that I was going to buy Hawkins out. He never

knew Hawkins. I never mentioned Hawkins' name to him."

To which ruling of the Court the defendant then and there duly and regularly excepted.

56.

The Court erred in overruling the objection interposed by the defendant Marron to the following questions propounded to the witness Brand on his direct examination by counsel for the plaintiff:

"Mr. BONSALL.—Q. How long did you continue to run that place?

Mr. SMITH.—That is objected to as immaterial, irrelevant and incompetent. What the witness Brand did at 1249 Polk Street is not in any way binding on the defendant Marron.

The COURT.—It may not be. I presume the district attorney will connect up the testimony.

Mr. BONSALL.—I promise to connect it up, your Honor.

The COURT.—Very well. Objection overruled.

Mr. SMITH.—Exception.

Mr. WISEMAN.—May it be subject to a motion to strike? [371]

The COURT.—Yes.

Mr. BONSALL.—If I don't connect it up I will move to strike it on my own motion.

Mr. SMITH.—At that time all the damage will be done.

The COURT.—We will hope that the District Attorney won't offer it unless he proposes to connect it up.

Mr. BONSALL.—Q. How long did you continue to run that place at 1249 Polk Street?

A. It must have been three or four months, probably.

Q. To what month, and in what year, did you continue to run it? A. I don't remember.

Q. Can you fix the date to the best of your recollection?

The COURT.—Have you anything before you with which to refresh his recollection?

Mr. BONSALL.—I have, your Honor.

The COURT.—Then ask him the question direct, if it was on a certain date.

Mr. BONSALL.—Q. Didn't you occupy this place until about September, 1923?

A. Yes, sir."

To which ruling of the Court the defendant then and there duly and regularly excepted.

57.

The Court erred in admitting into evidence over the objection of the defendant Marron, the following testimony given by the witness Brand:

"Mr. BONSALL.—Q. Just before you parted with the possession of this place, did you have a conversation with the defendant Eddie Marron about one George Birdsall?

Mr. SMITH.—That is objected to as immaterial, irrelevant and incompetent, not binding upon the defendant Marron, unless it is shown that the conversation in some way related to the subject [372] matter of the charge now being tried.

Mr. BONSALL.—We will show that.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

A. No, I did not.

The WITNESS.—(Continuing.) I told Eddie Marron that I wanted to get out of the place. Two days afterwards he had George Birdsall out there. I believe the next day afterwards he said that George Birdsall was going to come in there. I told him I wanted to get out of there. I didn't care who came in there."

To which ruling of the Court the defendant then and there duly and regularly excepted.

58.

The Court erred in admitting into evidence, over the objection of the defendant Marron the following testimony given by the witness Brand:

"Mr. BONSALL.—Q. Did he tell you how much salary Birdsall was going to get?

Mr. SMITH.—We object to that as immaterial, irrelevant and incompetent.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

A. No, he never did. I told him I was not paying Birdsall, I wanted to get my money out of the bank.

The WITNESS.—(Continuing.) I had some money in the bank from 1249 Polk Street. It was the Bank of Italy. The account was in my name and Eddie Marron's. We both had to sign checks."

To which ruling of the Court the defendant then and there duly and regularly excepted.

59.

The Court erred in admitting into evidence, over the objection [373] of the defendant Marron, the following testimony given by the witness Brand on his direct examination:

"Mr. BONSALL.—Q. Who suggested that the account be fixed in both names?

Mr. SMITH.—We object to that on the ground that it is assuming something that is not in evidence.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

The WITNESS.—(Continuing.) After I got the money about 4 or 5 days after I borrowed the money, he came up there with a friend of his and I believe bought a drink. He said, 'Oh, this is what you are doing.' I told him 'Yes.' He bought a drink. He said, 'You are selling booze.' I said 'Yes.' He said, 'What do you do with this money?' I said, 'I am keeping it.' He said, 'What about my thousand dollars?' I owed him $1325. He said, 'You had better put that in the bank for my protection; you might get knocked over and I would lose my money; put the money in the bank.' So I thought it was all right to put it in the bank, and let him know what I was doing with the money. So I put it in the bank. The money I took in. That was when I first started in. Then after that he would come up maybe once a week or once every two weeks. I had people in there drinking sometimes and there were rooms there, too. There were

times when he came up there that he saw people drinking in there. He had to sign checks.

Q. Did you ever have a final settlement of that bank account in the Bank of Italy with Eddie Marron?

A. He had to sign the checks. I wanted my money out of there, and he had to sign the checks, both of us had to sign the checks. I could not get hold of Marron sometimes for three or four days,—

Q. You have not answered my question, Mr. Brand.

Mr. WISEMAN.—I submit that it is an answer to the question. [374]

The COURT.—No, it is not.

Mr. BONSALL.—Q. Did you ever have a settlement with Marron on that bank account?

A. He had to sign the checks to release my money.

The WITNESS.—(Continuing.) I don't remember exactly the time of the settlement. It was in 1923. It was in the fall of 1923, I guess. Birdsall was there long before we had the settlement. I didn't step out after the settlement. I stayed around there to get the settlement; I could not find the man, he was not around the place. But I finally got the settlement and I did not stay around after that. I think I did for three or four days. I had a little money loaned out and I stayed around trying to get it. After I stayed around trying to get the money I didn't have any interest directly or indirectly in the premises at 1249 Polk Street. I gave up my interest at that time. I drew out the

money in the bank at the time of the final settlement of the bank account in the names of Brand and Marron at the Polk Street branch of the Bank of Italy. It was a small amount. I don't remember exactly. I received, I think, something in the 80's. I could not tell for it was from Marron. It was in an envelope by the cash register, left there for me. I found it in an envelope near the cash register with the money I asked for. I asked George Birdsall and I believe Eddie Marron was there and two or three other people. I said, 'I want to move my ice-box and chairs out.' Somebody said, 'What do you want for them?' I don't know exactly who said it. I said, 'Oh, give me $85,' or something like that. It was getting late, and I went home, and when I came back the next day there was $82 or $84. there on the register for me in an envelope. I recall looking over this testimony previous to this trial. There is no question about the testimony I gave at the last trial; I could not tell you what became of the furniture in the place. I left the furniture and everything in there. I objected to Mr. Marron paying Birdsall a [375] $20.00 salary. I had the money in the bank and I wanted back my money from the bank. I told him he could not give him $20 a day. I told Eddie Marron, this defendant."

To which ruling of the Court the defendant then and there duly and regularly excepted.

60.

The Court erred in overruling the objection interposed by the defendant Marron to the following

questions propounded to the witness Brand on his direct examination by counsel for the plaintiff:

"Mr. BONSALL.—Q. Have you ever seen this book before, Mr. Brand? A. Yes, I have.

Mr. SMITH.—We object to any testimony concerning this book upon all the grounds heretofore urged. May that objection be considered as having been made again at this time?

The COURT.—Very well. Objection overruled.

Mr. SMITH.—Exception.

Mr. BONSALL.—Q. Where did you see that book, Mr. Brand?

A. 1249 Polk Street.

Q. Are there any entries in there in your handwriting? A. Yes.

Mr. SMITH.—Just a second. That is objected to as immaterial, irrelevant and incompetent, and if so, then those entries are not in any way binding on the defendant, Marron.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

Mr. BONSALL.—Q. Now, will you be kind enough to show to what page your entries extend? Just take a minute and look through it.

Mr. SMITH.—May the same objection run to all this testimony, and upon the further ground that there has been no *prima facie* case of conspiracy shown to have existed between the defendant, Marron, and the witness, Brand; and upon the further ground that at a former [376] trial of this matter, by a verdict of the jury the witness, Brand,

was declared not to have been a co-conspirator, and that is an adjudication of the fact.

Mr. BONSALL.—If the Court please, any testimony that this man might give as to any transaction with Marron would be admissible, notwithstanding that they were not co-conspirators.

The COURT.—It is admissible as proving a conspiracy between Marron and other parties. Objection overruled.

Mr. SMITH.—Provided there is a *prima facie* showing of a case of conspiracy.

The COURT.—The District Attorney cannot prove his case all at one and the same time; it takes some time to get a case all in before the jury. When it is all in then is the time to determine whether or not a conspiracy has been made out.

Mr. SMITH.—The motion is overruled, your Honor?

The COURT.—Yes, overruled.

Mr. SMITH.—Note an exception.

A. Page 37 is all that I can see. And I didn't write everything up to page 37; some I didn't use there."

To which ruling of the Court the defendant then and there duly and regularly excepted.

61.

The Court erred in overruling the objection interposed by the defendant Marron to the following questions propounded to the witness Brand on his direct examination by counsel for the plaintiff.

"Mr. BONSALL.—Q. Well, we will take it up page by page. I show you these items of receipts

on page 2. We will skip the index. I show you these items of receipts on page 2; are any of those in your handwriting?

Mr. SMITH.—That is objected to as immaterial, irrelevant and incompetent; if there is anything in his handwriting it would [377] not be binding upon the defendant, Marron.

The COURT.—Objection overruled. Why repeat these objections, counsel? I thought you had put in an objection to all of the evidence of this witness relating to Government's Exhibit No. 1.

Mr. SMITH.—If we can have an omnibus objection that will cover all the testimony, your Honor, very well.

The COURT.—I don't know that you can have an omnibus objection by simply asking the Court to rule that way upon it. I thought you had already put in an objection covering that.

Mr. SMITH.—I objected to the particular question asked. At this time I will make an objection to all testimony sought to be elicited from this witness concerning entries in Government's Exhibit 1 upon all of the grounds heretofore urged.

The COURT.—Very well.

Mr. SMITH.—We note an exception.

Mr. BONSALL.—Q. Which of those figures are in your handwriting?

A. Right here.

Q. Not these ink figures. A. No.

The WITNESS.—(Continuing.) The entries in lead pencil are in my handwriting. The ink entries are not. I was in charge on August 12, 1923.

These entries were made at my direction in ink. Frank Darrow made them. I know his handwriting. He is an accountant. He was employed by me. I had him make up the books for me. The items on page 7 are in his handwriting; put there by my direction; also that is his on page 15, put there under my direction. Those figures on page 20 and 21 are in my handwriting, with the exception of those up there. They were put in by Darrow under my direction and on 22 and 23 were written by me; 24 and 25 were written by Darrow under my direction; 26, 27, 28 and 29 were written by me. The entry on page 31 is Darrow's writing. W. Brand, $480.99; E. Marron $603.08. $1012.05, were put there by my direction. [378]

The entries on pages 32 and 33, which says: 'Gross receipts and deposits in bank,' do not refer to my time; they are not mine. That has nothing to do with me; don't know nothing about them. In the last trial I testified about making certain deposits in the Polk Street branch of the Bank of Italy. Those are not shown in this book. I had a bank book and I put the money in the bank each day. I do not remember the date when I made the last deposit in the Polk Street branch of the Bank of Italy; what month or what year it was. I didn't make a deposit in 1924, in that account. I didn't make any around Thanksgiving of 1923. I don't remember if I made any in October, 1923. I am positive I didn't make any for November, 1923. I didn't have any connection with those premises at all after the bank account was closed with the prem-

ises 1249 Polk Street. I was up there. I was not running it; George Birdsall was looking after the place. I have already testified in this trial that I was proprietor of the place. I was, if you want to call it that way.

The COURT.—Q. Do you mean to say you were the proprietor, but that you were not running it.

A. I never had the settlement from the bank, yet. That is what I mean. I was conducting the place there in the beginning. I opened the place. At the time I received $80 or thereabouts for some of the fixtures in the place, I threw the gray ledger in the closet right off the hall. There was a trap in that closet. After I got that money I never made any other entries in the book. I never instructed anybody to make any entries. The date of the last entry was October 1, 1923.

Q. I call your attention to page 286 of this transcript, the testimony at the last trial, the time you were a defendant in this action, and I ask you to read that over and tell me if it is correct.

Mr. SMITH.—Q. What portion are you directing the witness' attention to, Mr. Bonsall?

Mr. BONSALL.—The middle of the page?

A. Yes. [379]

Q. Will you read it to the Court, commencing right here? 'When was it that the defendant, Marron, came to you with the proposition to take over the business himself?' And your answer commencing here: 'He came around there and told me that I was working alone, and he saw the business I was doing'—

Mr. SMITH.—Now, just a second. We object to this witness reading the testimony he has heretofore given.

The COURT.—Take it and read it and let us pass along.

Mr. SMITH.—I think the proper way to proceed is to let the witness testify according to his memory. This is not the proper way to refresh the witness' memory.

The COURT.—This will save time. He said he gave that testimony.

Q. You gave that testimony, Mr. Brand?

A. Yes, sir.

Mr. BONSALL.—I will read it. 'A. He came around there and told me that I was working alone, and he saw the business I was doing, and he said he thought he would put Birdsall up there, and asked me if I knew the man, and I said no. Then that night he said, "I think I will put him up here and take the place," and that afternoon he brings up a register, and I said, "You can take the place." So I asked him to give me the money that was in the bank, and he said he would as soon as he saw Farrell, the man that used to make up my books for me.'

The WITNESS.—(Continuing.) It was pretty hard to get Marron and Mr. Darrow together; one would be there but the other would not be there. I had some difficulty in getting a settlement, in getting all the parties together at one time. It went along for a couple of weeks before I finally got my settlement, and after that settlement I had

nothing to do with the place. That is correct. It might be a little over $100, probably $125.00, or something like that, I got out of that final settlement with Marron. I don't think there was [380] much money in the bank. I just asked Marron for a loan of $1,000. He never asked me what I was going to do with it. He was surprised to find out that I had a bootlegging place. He never asked me what I was going to do with it. He didn't ask me when I was going to pay it back, because I borrowed money from him before. On several occasions I borrowed $200 or $300 from him and he gave it to me without asking any questions. He didn't ask me when I was going to return the money to him when I borrowed it from him. No time was fixed. He just gave me the money when I asked him for it. He paid the $1,000 all at once. He gave me $1,000. He gave me $500 one time and $500 another time. I bought stock with it. He gave me the second $500 about half an hour after he gave me the first. He loaned money to me several times subsequent to that time. I never got any money after he gave me the $1000. He loaned me $500 first and a half hour later he loaned me $500. He went to the bank to get the rest of it. He didn't have it with him. I didn't tell him what I wanted the money for. He never asked me and I never told him. He didn't ask me for any security. Nothing, whatsoever. He didn't ask me for a note. I never gave a note. No writing of any kind. Not a bit. Merely upon my request for $1,000, he said, 'All right, I will let

you have it.' There was no conversation between us as to what the money was to be used for.

I have known Mr. Marron 7 or 8 years; longer than that, probably. I was very friendly with him. I was not very friendly with him. I met him occasionally. I would see him before I borrowed the money. I was not particularly friendly. He was a good friend of mine. I had never been in business with him before. He was a social acquaintance. Before I went up there I had another bootlegging place, and he used to come and visit me and buy a drink and walk out. That was before I got the Polk Street place. That was not where I met him. I met him away before that. I met him before Prohibition. I [381] have been in the saloon business all my life. I had a place of my own.

Mr. BONSALL.—Q. Did Eddie Marron loan you $500 about August 1, 1923? I call your attention to this testimony here at the last trial, your cross-examination by Mr. Smith, page 298 of the transcript. I ask you to read down from this question asked by the Court; read through these two pages to save time and tell me if that is correct.

Q. The only reason I ask you to read that is, Mr. Brand, that, according to that testimony, it seems there was some time between the time you got the first $500 and the second $500.

Mr. SMITH.—If that is the purpose of the testimony we object to the question on the ground

that counsel for the Government cannot impeach his own witness.

The COURT.—No, but he can refresh his memory.

Q. You say you got $500 the first time.

A. Yes, sir.

Q. And you said that half an hour later you got another $500? A. Yes, sir.

Q. Is that so?

A. I got $500 to get stock; then afterwards, about this time, about four or five days afterwards, I did get $500 from Eddie Marron.

Mr. BONSALL.—Q. From this defendant, Eddie Marron? A. Yes, sir.

Q. You got $1,500 from him all together?

A. I got $500 for the stock, but I gave him that $500 back again.

Q. I thought you had forgotten that.

A. I did forget it.

Q. Between the time you got the first $1,000 from Mr. Marron and the second $500 that you got—

Mr. SMITH.—Just a minute. I think counsel is misstating the evidence—not intentionally, but I think counsel, himself, is confused. The witness has not testified that he got $1,000 from Mr. Marron the first time. [382]

The COURT.—Well, let the witness tell it.

The WITNESS.—(Continuing.) I got $500 and I gave it to Hawkins as the deposit. I told him I would give him $500 in 30 days. He was satisfied. I got $500, and I bought some stock.

You cannot get very much stock for $500, so I ran short on stock and I got $500 from Marron. In the meanwhile I paid Marron back the $500, about the first of the month, or something like that. I got about $1,500 from him. I got $325 before I borrowed that.

Mr. BONSALL.—Q. Between the time when you got the first loan of $1000 and the second loan of $500, taking it that the two $500's on the first loan were given you within one hour, and we will call that one loan, did Mr. Marron come into your place?

A. He came up to give me the money.

Q. How many times did he come into your place before he let you have the second $500?

A. Before that he came up once a week.

Q. I didn't ask you that. I said between the time when you got the first and the second loans, how many times did he come in there?

A. After I took possession of the place?

Q. No, I didn't ask you that. I say between the time when you got the first and the second loans. How long a time was that, incidentally?

The COURT.—About how long?

A. About an hour or half an hour. He went down to the bank to get the rest of the money.

Q. You got $1000, did you not? A. Yes, sir.

Q. Between the time of getting the $1000 and the next $500, how much time elapsed?

A. About six days, probably.

Mr. BONSALL.—Q. And during that time did Mr. Marron come in to see you?

A. No, he did not.

Q. I call your attention—

A. Yes, he did, he came up there about two days afterwards, I believe.

Q. How many times did he come up there during that time? A. Once.

Q. Only once?

A. I think it was once he came up there. He never [383] stayed around the place.

The COURT.—Q. Did I understand you to tell the jury that he brought the $500 to you there at the Polk Street place? A. Yes.

The WITNESS.—(Continuing.)

Mr. BONSALL.—Q. Did he buy anything from you while he was up there?

The COURT.—Did he buy a drink?

A. He came up with a gentleman before that, and the gentleman bought a drink. That is the way he found out I was bootlegging. He did not like it very well, and he made me put his money in the bank. He said to me, 'If you get knocked over where is my money coming from?' So, after that I put it in the bank to protect the man's money. Of course, any time I might get arrested by the Federal authorities. I protected the money and put it in the bank, the money that was coming to him.

The COURT.—Q. Was that before he let you have the $500? A. Yes, sir.

Q. After that he let you have $500?

A. Before that, and then after he let me have

$500. I paid him $500 and then he let me have $500 to buy some stock.

Q. When he came up there he said, 'So this is what you are doing,' and he wanted you to put his money in the bank so his loan to you would be protected? A. Yes, sir.

Q. And thereafter he loaned you $500 more, did he? A. Yes, sir.

Q. He came up to the place on Polk Street and brought it up there himself, didn't he?

A. Yes, sir.

The WITNESS.—(Continuing.) Mr. Marron bought drinks. He bought one drink. That was before he loaned me the $500. I cannot remember whether he made more than one trip during those two days between the first and the second loan. He might have. I remember him talking to me about a bank account. That was not the time he bought the drink. I think it was the next day. I believe so; I don't *re-* [384] *That* was after he left me have the second $500.00.

Q. It was after he gave you the second $500. Then he suggested your having the joint bank account, did he?

The COURT.—No, that was before. He suggested the bank account after he let him have the $1,000.

Q. Is that correct? A. Yes, sir.

The COURT.—And thereafter he came and brought him $500.

Mr. BONSALL.—I see, your Honor.

Q. I call your attention to your testimony at page

299 at the last trial, in January, 1925, and ask you to read that through to refresh your recollection, reading through page 300.

A. Where do you want me to start, the whole of page 299?

Q. No, start here at this question, 'You just turned everything over to Marron, stock and everything?' And read from there down.

A. Yes, I guess that is right.

Q. Is that a correct statement, Mr. Brand?

A. Yes, sir.

Q. It was true at the time you testified to it, and it is true now? A. Yes, sir.

Mr. BONSALL.—I will read this.

The WITNESS.—I was arrested for conspiracy with Marron when I made that statement before the Court.

Mr. BONSALL.—We understand you were on trial. You were a defendant, and you were on the witness-stand.

The COURT.—Q. What do you mean by that, that you were testifying then to something wrong?

A. No, sir, I was not. I was arrested jointly with Eddie Marron for a conspiracy a year and a half afterwards. I made this statement there when I took the witness-stand.

Q. Is it true?

A. Absolutely; read it to the gentlemen of the jury.

Mr. BONSALL.—I will read it:

> Q. You just turned everything over to Marron, stock and everything?

A. Everything. The man I was buying stock of, he never came around. [385] I never called him up after that, and I never bought any stock from the time that Birdsall came in there. I quit buying stock.

Q. Was there any more stock put in?

A. There must have been, to run it.

Q. Do you know whether there was, or not?

A. I could not tell you, I never had anything to do with it. I would go up once a day to try to have a settlement.

Q. You could not get a settlement?

A. I could not get them both together, one day he would be there and one day he would not be there, until about 15 or 16 days afterward.

Q. How much did you get for your tables and chairs?

A. I think something like $82 or $84.

Q. Did that include all of the furniture in that place?

A. That included everything, that was my stuff, that I bought in the place.

Q. There was some stuff in there when you went there? A. Yes.

Q. You threw that all in too? A. Yes.

Q. You got about $84 for the whole business?

A. Yes, the extra table that I bought.

Q. Did that include the liquor you had on hand when Marron took it over?

A. There was not much liquor up there—that included everything.

Q. There was a stove in the kitchen, was there not? A. Yes.

Q. When you had your division with Marron finally, what was that division?

A. We went to the bank and took the money out of the bank.

Q. And did he give you all of the money in the bank? A. I got it all.

Q. There was $104.26, the last check that was drawn on November 14th; did you keep all of that $104? A. Yes. [386]

Q. He gave you in addition to that $84.

A. Yes.

The WITNESS.—(Continuing.) After November I had absolutely no connection with that place. After this final settlement, whatever date it took place, I never had anything more to do with it. I never had anything to do with it; I was taken sick and went to the hospital and was sick for three months."

To which ruling of the Court the defendant then and there duly and regularly excepted.

62.

The Court erred in admitting into evidence, over the objection of the defendant Marron, the following testimony given by the witness L. H. Coleman, while on a direct examination by counsel for the plaintiff.

"(By Mr. BONSALL.)

I am an adjuster for the Spring Valley Water Company. I have the records of our office as to

the charges made against 1249 Polk Street for water for the year 1924. This is the record that I have in my hand. From this record I can tell you who the water was charged to at 1249 Polk Street in 1924. It was charged to Eddie Marron.

Mr. BONSALL.—I will make a formal offer of that record in evidence, but ask that it be withdrawn so that the company might have its records, unless you have an objection to that, Mr. Smith.

Mr. SMITH.—We have an objection to its going in at all. I am in favor of the company keeping the record.

The COURT.—Read it into the record.

Mr. SMITH.—We object to the introduction of the testimony about to be elicited from the witness upon the ground that what the record shows is immaterial, irrelevant and incompetent, and no foundation laid for its introduction; there has been no *prima facie* showing of conspiracy, and that those records are not in any way binding on the defendant, Marron. [387]

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

WITNESS. — (Continuing.) The water was charged to Edward Marron. We keep our records by the monthly rate. I can call out each item, if you want it. From October 24, 1923, to November 4, 1924." [388]

63.

The Court erred in admitting into evidence over the objection of the defendant Marron the testimony of Clarence W. Bell, with reference

to a bank account in the name of Brand and Marron, at the Polk-Van Ness Branch of the Bank of Italy, from April, 1923, to December, 1924. The full substance of the evidence is more fully set out in the following extracts from the testimony of said witness while under direct examination by counsel for the plaintiff:

"(By Mr. BONSALL.)

I am assistant Vice-President, Bank of Italy. I am at present at the head office. I was formerly attached to the Polk Street Branch; from some time in April, 1923, to about the middle of December, 1924. I was in charge there during that time. I have seen the sheet of paper before that I am now being shown. It is an official record of the Bank of Italy, kept in the usual course of business.

Q. What is that record?

Mr. SMITH.—I object to that on the ground that it is calling for the conclusion of the witness. The record speaks for itself.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

A. This is the ledger-sheet of an account of Brand and Marron at the Polk-Van Ness Branch.

Mr. BONSALL.—Q. Can you tell from that when that account was opened? A. Yes, sir.

Mr. SMITH.—Just a second. Before we have any more testimony from this witness, may it please the Court, I object to any testimony concerning the account between Brand and Marron on the ground that it is immaterial, irrelevant and incompetent,

that it is not shown at any time in the proceedings so far to have been in any way connected with the subject matter now on trial here; upon the [389] further ground that there has been no *prima facie* showing of conspiracy existing between the defendant Marron and the person named Brand.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

Mr. BONSALL.—Q. When was it?

A. September 4, 1923.

Q. And from that can you tell when the account was closed out? A. I can.

Q. What is that date?

A. November 14, 1923.

Q. Calling your attention—

Mr. SMITH.—Just a second. So that there will not be the necessity of repeating these objections, may my objection run to all these questions, if the Court please?

The COURT.—Yes. Objection overruled.

Mr. SMITH.—And an exception noted?

The COURT.—Very well.

Mr. BONSALL.—Q. Calling your attention to this stamp, 'Two signatures required,' what does that indicate to you?

A. That means that withdrawals had to be made by the signatures of both Mr. Brand and Mr. Marron."

To which ruling of the Court the defendant then and there duly and regularly excepted.

64.

The Court erred in admitting into evidence over the objection of the defendant Marron the following document, to wit, United States Exhibit No. 16; a ledger sheet of the account of Brand and Marron at the Polk and Van Ness Branch, Bank of Italy:

"Mr. BONSALL.—I offer this in evidence.

The COURT.—Admitted.

Mr. SMITH.—May the record show that prior to the order admitting it there was the same objection, and that the objection [390] was overruled and an exception noted?

The COURT.—Very well."

To which ruling of the Court the defendant then and there duly and regularly excepted.

65.

The Court erred in admitting into evidence over the objection of the defendant Marron the following testimony given by the witness, Sidney Franklin, under direct examination by counsel for the plaintiff:

"Direct Examination.

(By Mr. BONSALL.)

I was a Deputy Registrar for the City and County of San Francisco, on January 14, 1924. I have seen the paper before that I am now being shown. That is an affidavit of registration that I made out on that date. That is my signature down there.

Q. Is that your signature down there?

A. Yes, sir.

Q. Did you see it signed? Do you know whose signature that is?

Mr. SMITH.—Now, just a second. We object to all of this examination, your Honor—

Mr. BONSALL.—This is for the purpose of getting an exemplar of handwriting.

Mr. SMITH.—Upon the ground that it is immaterial, irrelevant and incompetent.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

A. It is the signature of the man that answered the questions."

To which ruling of the Court the defendant then and there duly and regularly excepted.

66.

The Court erred in overruling the objections interposed by the defendant Marron to the following questions propounded to the witness, Sidney Franklin, on his direct examination by counsel for [391] the plaintiff.

"Mr. BONSALL.—Does the defendant, Joseph E. Marron, vote—I will withdraw that question. If the Court please, I offer this in evidence for the purpose of using it as an exemplar.

Mr. SMITH.—We object to it as immaterial, irrelevant and incompetent, and it could not possibly have anything to do with the issues now involved in this matter.

Mr. BONSALL.—There are three ways of proving handwriting, your Honor.

The COURT.—Yes, we know that. Are you offering it now in evidence, or offering it for identification?

Mr. BONSALL.—I was going to offer it in evidence.

Mr. SMITH.—We object to it as immaterial, irrelevant and incompetent.

The COURT.—There is no evidence here that that is the affidavit of registration of the defendant, Marron.

Q. Do you know the defendant, Marron, here in court? A. No, sir, I do not.

Q. Did you ever see him before?

A. I may have seen him.

Mr. BONSALL.—Did you testify in the last trial? A. Yes, sir.

Q. Did you testify at that time that this was the signature of the defendant, Joseph E. Marron?

A. No, sir.

Mr. WISEMAN.—He was not asked that question at the last trial.

The COURT.—I suppose, Gentlemen, it may be said that that is an official record, isn't it?

Q. Isn't that an official record?

A. It certainly is; yes, sir.

Mr. BONSALL.—Q. Can you recognize the man now that you took this affidavit from?

A. No, sir. I took probably 5000 affidavits in the first part of that year. I would not recognize anybody. [392]

Q. Did this man give his address as 2031 Steiner Street, San Francisco, California? A. Yes, sir.

Mr. SMITH.—Now, just a second. We submit that the record, itself, is the best evidence of that fact.

The COURT.—That is so. Objection overruled.

Mr. BONSALL.—Q. Did you fill this form in yourself? A. Yes, sir.

Mr. SMITH.—Just a second. We submit that the affidavit is the best evidence of what it contains.

The COURT.—He simply asked him if he filled it in himself. There can be no objection to that.

Mr. BONSALL.—Q. At whose direction did you fill it in?

A. The man who signed it.

Q. The man who signed it and who gave his address as 2031 Steiner Street? A. Yes, sir.

Mr. SMITH.—Now, just a second. That is objected to, if the Court please, as immaterial, irrelevant and incompetent.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

Mr. BONSALL.—Q. And what does this mean?

A. That means that he occupied the whole flat.

Q. And occupation dairyman, and born in California. This record shows here a ballot number, 15353, voted: What does that indicate to you?

A. That he voted at the election.

Q. Whoever signed this signature voted at that election and the ballot number was 15353: Is that correct? A. Yes, sir.

Mr. SMITH.—Just a second. We ask that the answer go out for the purpose of our objection.

The COURT.—Make your objection.

Mr. SMITH.—It is objected to as calling for the opinion and conclusion of the witness and any testimony that he might give [393] thereon is purely hearsay.

The COURT.—Objection overruled.

Mr. SMITH.—Exception."

To which ruling of the Court the defendant then and there duly and regularly excepted.

67.

The Court erred in admitting into evidence over the objection of the defendant Marron the following document; to wit, United States Exhibit No. 17, entitled "Affidavit of Registration":

"Mr. BONSALL.—I will ask that this be admitted in evidence on this theory, on the similarity of names.

The COURT.—You may admit it and hereafter connect it up.

Mr. SMITH.—We object to it on all the grounds heretofore urged.

The COURT.—Objection overruled. You can hereafter move to strike it out.

Mr. SMITH.—Exception."

To which ruling of the Court the defendant then and there duly and regularly excepted.

68.

The Court erred in overruling the objection interposed by the defendant, Marron, to the following question propounded to the witness, Walter W. Menne, on direct examination by counsel for plaintiff:

"(By Mr. BONSALL.)

I am a General Clerk, and on July 26, 1924, I was Deputy Registrar of voters. I have seen this paper that I am now being shown. That is my signature.

Q. I show you the signature George L. Birdsall.

Mr. SMITH.—Now, just a second. We object to any testimony concerning any signature of George Birdsall on the ground that [394] it is immaterial, irrelevant and incompetent.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

The WITNESS.—(Continuing.) I do not know the signature. I know that it was signed in my presence. It is an official record of the City and County of San Francisco."

To which ruling of the Court the defendant then and there duly and regularly excepted.

69.

The Court erred in overruling the objections interposed by the defendant Marron to the following questions propounded to the witness, Menne, on his direct examination by counsel for the plaintiff:

"Q. I show you this ballot number, 3457, Voted: What does that indicate?

Mr. SMITH.—We object to that on the ground it is calling for the conclusion of the witness.

The COURT.—It indicates that he voted. Why waste time on that?

Mr. SMITH.—We submit that it is improper evidence.

The COURT.—No, it is not. Objection overruled.

Mr. SMITH.—Exception.

The COURT.—That mark indicates he voted: Is that right?

A. Yes, sir.

Mr. BONSALL.—Q. And he gave his address as 519 Belvedere Street? A. Yes, sir."

To which ruling of the Court the defendant then and there duly and regularly excepted.

70.

The Court erred in admitting into evidence over the objection of the defendant, Marron, the following document, to wit, United [395] States Exhibit No. 18, entitled "Affidavit of Registration":

"Mr. BONSALL.—This is offered in evidence under the same condition.

Mr. SMITH.—Objected to as immaterial, irrelevant and incompetent, and hearsay, in so far as the defendant, Marron, is concerned, and it is not binding on him in any particular.

The COURT.—Objection overruled.

Mr. SMITH.—Exception."

To which ruling of the Court the defendant then and there duly and regularly excepted.

71.

The Court erred in overruling the objection interposed by the defendant, Marron, to the following question propounded to the witness, Charles J. Hagerty, on his direct examination by counsel for the plaintiff:

"Q. Have you with you the affidavit of Joseph Edmond Marron, made on July 12, 1916?

A. Yes.

Mr. SMITH.—I object to that as immaterial, irrelevant and incompetent, and any records made in the year 1916 were prior to the time that this conspiracy, or this alleged conspiracy, came into existence.

Mr. BONSALL.—It is merely for the purpose of getting exemplars of handwriting.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

Mr. BONSALL.—Q. Have you that with you?

A. I think it is 1917, instead of 1916.

Q. Either one will do. A. This is it."

To which ruling of the Court the defendant then and there duly and regularly excepted. [396]

72.

The Court erred in admitting into evidence over the objection of the defendant Marron the following document, to wit, United States Exhibit No. 19, entitled, "Declaration of Candidacy":

"(By Mr. BONSALL.)

Q. This is an official record filed in connection with the candidacy of Joseph Edmond Marron?

A. Yes, sir.

Q. Filed in the office of the Secretary of State?

A. Yes, sir.

Mr. SMITH.—We object to that on the ground it is immaterial, irrelevant and incompetent.

Mr. BONSALL.—We offer this in evidence, and,

subject to your objection, I would like to permit a photostatic copy to be filed, so that this record may go back to the Secretary of State.

Mr. SMITH.—I have no objection to the substitution of a photostatic copy, but we do object to the introduction of the original into evidence.

The COURT.—Objection overruled.

Mr. SMITH.—Exception."

To which ruling of the Court the defendant then and there duly and regularly excepted.

73.

The Court erred in overruling the objection interposed by the defendant, Marron, to the following questions propounded to the witness, George W. Marsh, on his direct examination by counsel for the plaintiff:

"(By Mr. BONSALL.)

A. I am a building inspector. I have been such for two years. I was familiar with the premises at 1249 Polk Street, in the City and County of San Francisco, in the year 1923.

Q. Did you ever make any purchases of liquor there?

Mr. SMITH.—To which we object on the ground it is immaterial, [397] irrelevant and incompetent.

The COURT.—What time in 1923?

Mr. BONSALL.—Q. What time in 1923 did you make purchases there?

Mr. SMITH.—We object to that as assuming something not in evidence.

Mr. BONSALL.—All right, I will strike out the question; I did assume a whole lot.

Q. What time in 1923 did you go there, Mr. Marsh? A. The end of 1923.

The COURT.—Very well, go ahead.

Mr. SMITH.—Exception.

The WITNESS.—(Continuing.) I went there in 1923, I guess a couple of times a week. I don't know exactly for how long. I don't know exactly whether it was in September or October, but it was something like that, I can't remember exactly, but I think it was during the last three or four months. And when I went there on those occasions, I went in to get a drink.

Q. What kind of drinks did you buy there?

Mr. WISEMAN.—Just a minute; we object to these questions on the grounds that they are immaterial, irrelevant and incompetent—in September and October, 1923—the evidence of the witness, Brand, shows that that was before the defendant, Marron, was in there.

The COURT.—Objection overruled.

Mr. WISEMAN.—Exception."

To which ruling of the Court the defendant then and there duly and regularly excepted.

74.

The Court erred in overruling the objection interposed by the defendant Marron to the following questions propounded to the [398] witness, Marsh, on his direct examination by counsel for the plaintiff:

"(By Mr. BONSALL.)

I know Walter Brand. I bought drinks from him at 1249 Polk Street. I know Mahoney.

Q. Did you ever buy any drinks at that address?

A. Yes, sir.

Mr. SMITH.—Just a second. We object to the last question and ask that the answer go out for the purposes of our objection, on the ground that if he bought liquor from Mahoney it is not at all binding on the defendant Marron—or from Brand, either.

The COURT.—Objection overruled.

Mr. SMITH.—Exception."

To which ruling of the Court the defendant then and there duly and regularly excepted.

75.

The Court erred in overruling the objections interposed by the defendant Marron to the following questions propounded to the witness Marsh on his direct examination by counsel for the plaintiff:

"Mr. BONSALL.—Q. Do you know George Birdsall? A. Yes.

Q. Did you ever buy any drinks from him there?

Mr. SMITH.—The same objection, immaterial, irrelevant and incompetent, no *prima facie* showing of conspiracy between Birdsall and the defendant Marron.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

A. Yes, sir.

The WITNESS.—(Continuing.) When I saw Marron there, around there, I don't know what he

was doing. I seen him coming in and going out at different times. I would not say that he was in the same room. I met him maybe in the hall. I would not say positively whether he was or was not. They had five or six rooms there, you know." [399]

To which ruling of the Court the defendant then and there duly and regularly excepted.

76.

The Court erred in overruling the objection interposed by the defendant Marron to the following questions propounded to the witness Bivens on his direct examination by counsel for the plaintiff:

"Mr. BONSALL.—Q. Did you ever make any purchases of liquor at 1249 Polk Street?

Mr. SMITH.—The same objection.

The COURT.—Objection overruled.

Mr. SMITH.—Your Honor, there is no time fixed.

The COURT.—The witness said within two years.

Mr. BONSALL.—Q. Did you ever make any purchases of liquor there?

Mr. SMITH.—Objected to as immaterial, irrelevant and incompetent.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

A. Yes, sir.

The WITNESS.—(Continuing.) In 1923 or 1924, I made purchases there, I know, but I don't remember the date. It was about 1923 or 1924, both, I guess. I think it was the latter part of 1924,

and during the year 1924, I purchased drinks from Brand, Birdsall, Mahoney, the three defendants in the former trial. I asked for whiskey. It was supposed to have been whiskey that I got. I paid for it at all times. I went there and asked for whiskey and paid my money and got it. I know defendant, Eddie Marron. I have seen him before in the premises 1249 Polk Street in the City and County of San Francisco, State of California. I think I have seen him in the room when I purchased the drinks. I have seen him a few times. I could not say exactly how many times." [400]

To which ruling of the Court the defendant then and there duly and regularly excepted.

77.

The Court erred in overruling the objection interposed by the defendant Marron to the following questions propounded to the witness W. K. Latham, on his direct examination by counsel for the plaintiff:

"Q. Did you know a man by the name of Joseph Gorham?

Mr. SMITH.—We object to that as immaterial, irrelevant and incompetent, and not binding on the defendant Marron whether or not he knew Gorham.

Mr. BONSALL.—He is a defendant.

The COURT.—What is the purpose of it?

Mr. BONSALL.—I want to show that Gorham was in 1249 Polk Street on one occasion.

The COURT.—He is not on trial here.

Mr. BONSALL.—He is not on trial, your Honor, but I want to establish the conspiracy.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

The WITNESS.—(Continuing.) I met the defendant, Gorham, there. A man who turned out later on to be Gorham came in on Sunday morning when I was in the place. I presume it is Police Sergeant Gorham.

Q. A defendant in the last trial?

Mr. SMITH.—Just a second. We object to that as leading and suggestive.

The COURT.—Objection overruled.

Mr. SMITH.—Exception.

The COURT.—Q. He was a defendant in the case when it was tried before?

A. Yes, sir.

The WITNESS.—(Continuing.) I went in there one Sunday morning [401] and I was buying a drink in there and he came in. I didn't know that it was Gorham at the time. He came in there and stood around there and he looked at me in such an intensive manner that I really could not help but look at the fellow and look back at him. I little suspected then that he was a police officer. He was dressed in citizen's clothes. I poured out a drink and threw out the half dollar and I drank it and went downstairs. I was under the impression that I must have seen the boss of the place, from the manner in which he looked at me; it aroused my suspicions and I looked back at him and got a good look at him. Of course, I did not know at the time that he was a police officer. On an occasion I saw a man in police officer's uniform in that place. One

evening when I was going in there a man came down the stairs in uniform, but I could not say who he was. It was dark in this hallway. He came downstairs as I went up. I was more or less under the impression that there must have been a raid on the place, and I hesitated about going up. Finally, I went up there. I could not say who the police officer was. I know the man was in uniform."

To which ruling of the Court the defendant then and there duly and regularly excepted.

78.

The Court erred in overruling the objection interposed by the defendant Marron to the following questions propounded to the witness John J. Casey on his direct examination by the counsel for the plaintiff:

"Mr. BONSALL.—Q. Did you ever speak with the defendant, Eddie Marron, regarding the premises at 1249 Polk Street?

Mr. SMITH.—We object to that as immaterial, irrelevant and incompetent; no time has been fixed, and it is not shown that such matter could have anything to do with the issues now being tried here.

The COURT.—I presume it is preliminary. Objection overruled. [402]

Mr. SMITH.—Exception.

A. I spoke to Eddie Marron about the premises some time in October.

WITNESS.—(Continuing.) In October, 1924, that conversation took place at 1249 Polk Street. I had some conversation with him about the entries in the gray ledger.

Mr. SMITH.—Now, just a second. May my general objection be considered as having been made again at this time in respect to the United States Exhibit No. 1?

The COURT.—Yes. Objection overruled.

Mr. SMITH.—Exception."

To which ruling of the Court the defendant then and there duly and regularly excepted.

79.

The Court erred in overruling the objection interposed by the defendant Marron to the following questions propounded to the witness Jens Johan Neilsen on his direct examination by counsel for the plaintiff:

"(By Mr. BONSALL.)

I live at Sausalito, in San Rafael, in the County Jail. I know the defendant, Marron, the man over there.

Mr. BONSALL.—Q. Did you ever see him at 1249 Polk Street in the City and County of San Francisco?

Mr. WISEMAN.—The same objection, your Honor, unless a time is specified.

The COURT.—Objection overruled.

Mr. WISEMAN.—Exception.

A. Yes, I met him up there."

To which ruling of the Court the defendant then and there duly and regularly excepted.

80.

The Court erred in overruling the objection interposed by [403] the defendant Marron to the following questions propounded to the witness Neilsen

on his direct examination by counsel for the plaintiff:

"Mr. BONSALL.—Q. When was it that you visited 1249 Polk Street in this city?

A. It is so long ago that I cannot remember exactly.

Q. Well, approximately. Can you fix it by any occurrences that happened, like boats that you might have owned?

A. It was some time before I lost my boat in 1924.

Q. What boat do you refer to?

Mr. WISEMAN.—We object to that as immaterial, irrelevant, and incompetent, and not binding on this defendant.

The COURT.—Objection overruled.

Mr. WISEMAN.—Exception.

A. That was the boat '839,' I believe.

Q. The boat 'B-839'? A. Yes, sir.

Q. What became of the 'B-839'?

Mr. WISEMAN.—The same objection, your Honor.

The COURT.—Objection overruled.

Mr. BONSALL.—I am trying to fix a time.

The COURT.—I understand. It is preliminary.

Mr. WISEMAN.—Exception.

A. It sunk, almost.

Mr. BONSALL.—Q. Do you know about what date the boat sunk?

Mr. WISEMAN.—The same objection.

The COURT.—Objection overruled.

Mr. WISEMAN.—Exception.

A. On the 17th of March.

Mr. BONSALL.—Q. 1924? A. Yes, sir."

To which ruling of the Court the defendant then and there duly and regularly excepted. [404]

81.

The Court erred in overruling the objection interposed by the defendant Marron to the following questions propounded to the witness Neilsen on his direct examination by counsel for the plaintiff:

"Mr. BONSALL.—Q. And it was about that time that you were going to 1249 Polk Street, in this city?

A. Just about.

Q. Did you buy any liquor there?

A. Well, I think I bought a glass of Scotch whiskey.

Q. And it was about that time that you saw the defendant, Eddie Marron, there?

A. Yes, I believe I saw him at that time.

Q. Did you have any other business at 1249 Polk Street, other than going there to get a drink?

Mr. WISEMAN.—We object to that as immaterial, irrelevant and incompetent, and on the further ground that any business that he might have had at 1249 Polk Street is not binding on the defendant, unless there is a *prima facie* case of conspiracy established; and on the further ground that it is an attempt to show or prove an overt act not alleged to be in furtherance of the conspiracy—not alleged in the indictment.

The COURT.—Objection overruled. It is preliminary. We don't know what they are attempting to prove, yet.

Mr. WISEMAN.—Exception."

To which ruling of the Court the defendant then and there duly and regularly excepted.

82.

The Court erred in overruling the objection interposed by the defendant Marron to the following questions propounded to the witness Neilsen on his direct examination by counsel for the plaintiff:

"Mr. BONSALL.—Q. What other object did you have in visiting 1249 Polk Street, except to get a drink?

Mr. WISEMAN.—The same objection. [405]

The COURT.—Objection overruled.

Mr. WISEMAN.—Exception.

A. I went there to get an order to go out to the 'Malahat.' "

To which ruling of the Court the defendant then and there duly and regularly excepted.

83.

The Court erred in refusing to strike from the record the following testimony of the witness Neilsen:

"Mr. BONSALL.—Q. What other object did you have in visiting 1249 Polk Street, except to get a drink?

Mr. WISEMAN.—The same objection.

The COURT.—Objection overruled.

Mr. WISEMAN.—Exception.

A. I went there to get an order to go out to the 'Malahat.'

Mr. WISEMAN.—We move to strike out the answer on the same grounds urged in our objection.

The COURT.—Motion denied.

Mr. WISEMAN.—Exception."

To which ruling of the Court the defendant then and there duly and regularly excepted.

84.

The Court erred in admitting into evidence, over the objection of the defendant Marron, the following testimony given by the witness Neilsen:

"Mr. BONSALL.—Q. When you refer to the 'Malahat, what boat is that?

Mr. WISEMAN.—The same objection.

The COURT.—Objection overruled.

Mr. WISEMAN.—Exception.

A. That is a rum ship."

To which ruling of the Court the defendant then and there duly [406] and regularly excepted.

85.

The Court erred in admitting into evidence, over the objection of the defendant Marron, the following testimony of the witness Neilsen:

"Mr. BONSALL.—Q. That is a rum ship, or was? A. Yes.

Q. Did you get that order?

A. Yes, as far as I remember, I did.

Q. Who did you get it from?

A. Well, I believe I got it from Eddie Marron.

Q. Did you go out to the 'Malahat' with that order?

Mr. WISEMAN.—Just a moment. We make the same objection, your Honor, and upon the further ground that it is an attempt to show or prove an overt act not alleged to be in furtherance of the

conspiracy, and directly on all fours with the Terry Case.

The COURT.—Objection overruled.

Mr. WISEMAN.—Exception.

Mr. BONSALL.—Q. Did you go out to the 'Malahat' with that order? A. Yes, sir.

Q. Did you get liquor from the 'Malahat' on that order?

Mr. WISEMAN.—The same objection.

The COURT.—Objection overruled.

Mr. WISEMAN.—Exception.

A. I did.

Mr. BONSALL.—Q. What boat did you have?

A. I had the 'H-39.'

Q. Did you bring this liquor back to the shore from the 'Malahat'?

Mr. WISEMAN.—The same objection, your Honor. In the interest of time, may it be stipulated that the objection will run to whatsoever testimony is elicited from this witness with respect to the incident of the 'Malahat'?

The COURT.—Yes; objection overruled.

Mr. WISEMAN.—Exception. [407]

A. Yes.

The COURT.—Q. How much did you bring back?

A. Well, if I remember right it was about 100 cases.

Q. Of what? A. Scotch.

Q. Scotch whiskey? A. I think it was, yes.

Mr. BONSALL.—Q. Where was that landed?

A. That was landed somewhere around Mission Rock, between Piers 46 and 54.

Q. What time were those 100 cases landed, what time of the day or night?

A. It was in the evening, I don't know exactly what hour.

Q. Was it dark? A. Yes, sir.

Q. Who were there at the time this liquor was landed?

Mr. WISEMAN.—If your Honor please, as far as the incident of the 'Malahat,' and the liquor, and the landing of the liquor, we renew the objection on the ground it is immaterial, irrelevant and incompetent, and, further, it is an attempt to show an overt act not alleged in the indictment, either measured by the indictment, itself, or by the testimony as elicited during the trial.

The COURT.—Objection overruled. As I understand it, every overt act does not have to be alleged.

Mr. WISEMAN.—But the conspiracy must be measured by the allegations of the indictment, or the testimony elicited from the witness on the trial. The same situation developed in the Terry case.

The COURT.—Objection overruled.

Mr. WISEMAN.—Exception."

To which ruling of the Court the defendant then and there duly and regularly excepted.

86.

The Court erred in overruling the objection interposed by the defendant Marron to the following question:

"Mr. BONSALL.—Q. Who were there at the time this liquor was landed? [408]

Mr. WISEMAN.—If your Honor please, as far as the incident of the 'Malahat,' and the liquor, and the landing of the liquor, we renew the objection on the ground it is immaterial, irrelevant and incompetent, and, further, it is an attempt to show an overt act not alleged in the indictment, either measured by the indictment, itself, or by the testimony as elicited during the trial.

The COURT.—Objection overruled. As I understand it, every overt act does not have to be alleged.

Mr. WISEMAN.—But the conspiracy must be measured by the allegations of the indictment, or the testimony elicited from the witness on the trial. The same situation developed in the Terry case.

The COURT.—Objection overruled.

Mr. WISEMAN.—Exception.

WITNESS.—(Continuing.) I do not know who was present at the time I brought that load ashore. I do not know. I was paid for that load at 1249 Polk Street, in the City and County of San Francisco. I was paid $3.00 a case. I was paid $300 in currency by Eddie Marron personally. I don't know how long after the liquor was landed that I went to 1249 Polk Street and received my pay. I don't know, maybe a day or two. I am not sure, not very long afterwards."

To which ruling of the Court the defendant then and there duly and regularly excepted.

87.

The Court erred in admitting into evidence, over the objection of the defendant Marron, the following

testimony given by the witness Marron on his direct examination by counsel for the plaintiff:

"Mr. BONSALL.—Q. Did you make any other trips on orders furnished by the defendant?

Mr. WISEMAN.—The same objection, your Honor.

The COURT.—Objection overruled.

Mr. WISEMAN.—Exception. [409]

A. I made one on the 17th of March.

The COURT.—Q. That is the one you have just testified to, isn't it? A. No, that was before that.

Mr. BONSALL.—Q. On the 17th day of March of what year?

A. If I remember right it was 1924.

Q. You had an order from Eddie Marron?

A. Yes, sir.

Q. Where did you go with that order?

A. To the 'Prince Albert.'

Q. Did you get that order filled at the 'Prince Albert'?

Mr. WISEMAN.—We make the same objection to the 'Prince Albert' incident as we made to the 'Malahat' incident, and to the incident of the landing of the liquor.

The COURT.—Very well; objection overruled.

Mr. WISEMAN.—Exception.

A. Yes, sir.

WITNESS.—(Continuing.) I did not land that liquor because I got swamped during the night. I never got paid for that liquor. I went to Marron and told him how it happened. I went to see him at 1249 Polk Street in this City and County and State.

I went to see him there after it happened, about a day or two after I came ashore. I just told him I lost them, and he told me it was too bad that I had to lose my boat. I did lose my boat at that time. I took off 150 cases from the 'Prince Albert.' There was some champagne and some Scotch. I was to get the same price for that, $3.00 a case. I did not make any other reference to the loss of the liquor to the defendant, Marron. I think I made one more trip later on for the defendant, after that. I don't know exactly, it was between that time and probably two or three months later. I don't know. I am not sure."

To which ruling of the Court the defendant then and there duly and regularly excepted.

88.

The Court erred in admitting into evidence, over the objection [410] of the defendant Marron, the following testimony given by the witness Neilsen on his direct examination by counsel for the plaintiff:

"Mr. BONSALL.—Q. What boat did you make that trip with?

Mr. WISEMAN.—Just a moment. We renew our objection to this incident, the same as to the other incidents, upon the same ground.

The COURT.—Very well; objection overruled.

Mr. WISEMAN.—Exception.

WITNESS.—(Continuing.) I had an order at that time furnished by the defendant, Marron. I was to go to the 'Malahat,' if I remember right. I did go to the 'Malahat'; I did present the order. I went out there on the boat that the Government

seized. The name of the boat was the 'L. C. L.' They gave me the liquor on that order, and I loaded it on the 'L. C. L' I brought the liquor ashore. I think it was 150 cases; I think it was landed on Pier 20, between Pier 20, or 22, in this city. It was around midnight that I brought it ashore. I saw the defendant, Marron, at that time. I believe I did. No, I don't think I saw him when I first came ashore at that time. I don't think then, but he came right afterwards. I waited around a while and then he made his appearance. It took me about an hour and a half to get the liquor upon the wharf. I saw a truck on the shore. There was a truck standing there. I got paid for carting that liquor, at 1249 Polk Street in this city. I saw the defendant there. Eddie Marron paid me for this lot of liquor, Eddie Marron himself. It was about a day or two after the liquor was landed on shore before I went to get my money. He paid me $3.00 a case. All told that would be $450. He paid me in currency; he usually paid me in one of the front rooms at 1249 Polk Street."

To which ruling of the Court the defendant then and there duly and regularly excepted.

89.

The Court erred in refusing to strike from the record the [411] testimony of the witness Neilsen in respect to the landing of liquor from the boats "Malahat," "Prince Albert," and the trip designated as having been made on the boat "L. C. L.," which motion follows:

"Mr. WISEMAN.—For the purpose of the record, I make a motion at this time to strike out all of the testimony of the witness Neilsen in so far as these incidents concerning the landing of liquor from these various ships, together with the landing at the wharves, and its transportation, on the ground that it is immaterial, irrelevant and incompetent; they are not charged or alleged in the indictment on file herein on which the defendant, Marron, is now standing trial; they are not shown by either the indictment, or by the testimony, to have been done in furtherance of or for the purpose of effecting the object or purpose of the conspiracy.

The COURT.—Motion denied.

Mr. WISEMAN.—Exception."

To which ruling of the Court the defendant then and there duly and regularly excepted.

90.

The Court erred in admitting into evidence, over the objection of the defendant Marron, Exhibits Nos. 10, 11, 12, 13, and 14, for Identification, being bottles; and in admitting into evidence the testimony of the witness F. D. Stribling with respect to the same.

"Mr. SMITH.—So that our record may be complete, if the Court please, may the objection to this testimony be considered as having been made, as was made heretofore, with respect to all property seized at 1249 Polk Street?

The COURT.—Very well, Mr. Smith.

Mr. SMITH.—And an exception reserved.

Which objection was renewed, overruled and excepted to after the witness Stribling was questioned by counsel for the plaintiff respecting said exhibits, and prior to their being admitted in evidence."

To which ruling of the Court the defendant then and there duly and regularly excepted. [412]

91.

The Court erred in admitting into evidence over the objection of the defendant Marron all of the testimony of the witness, E. O. Heinrich, with respect to United States Exhibit No. 1, a ledger; United States Exhibit No. 8, an envelope containing five slips of paper with longhand writing on same; United States Exhibit No. 17, an Affidavit of Registration; United States Exhibit No. 18, an Affidavit of Registration, and United States Exhibit No. 19, a Declaration of Candidacy.

"(By Mr. BONSALL.)

Q. I show you Government Exhibit No. 17 and ask you if you have ever seen that before?

Mr. SMITH.—Just a second. So as to save the necessity of constantly interrupting the orderly process of the taking of this testimony, may our objections that heretofore have been interposed with respect to all the papers, documents, and memoranda seized on the 2d day of October, at 1249 Polk Street be considered as having been remade at this time to this testimony?

The COURT.—Yes, Mr. Smith. Objection overruled.

Mr. SMITH.—Exception.

WITNESS.—(Continuing.) I have seen before Government Exhibit No. 18 in evidence. I have seen before Government Exhibit No. 8 in evidence, containing 5 slips of paper with longhand writing on them. I have made an examination of all these exhibits. I prepared for them illustrations in connection with them

These documents that I am now being shown are the papers I prepared. They are all exemplars prepared from the exhibits I have been shown. They are enlargements of portions of the exhibits which have been shown me heretofore. They are photographic enlargements, all taken from the exhibits I have been shown. From the examination of all the exhibits that I have been [413] shown, I have come to a conclusion as to who wrote the writing that is covered in Government's Exhibit No. 1 in evidence from page 34 on.

The full substance of the evidence so admitted is more fully set out in the following extracts from said witness' testimony while under direct examination by counsel for the plaintiff:

"(By Mr. BONSALL.)

Q. What is that conclusion?

A. Most of the entries in that book, beginning with page 34, and excepting the entries which appear as footings of columns and check marks having the general appearance of audit marks, were written by the writer who has prepared Government's Exhibit No. 19 and Government's Exhibit No. 17—that is, the signature writing 'Joseph E.

Marron, 2031 Steiner Street' appearing on Government's Exhibit No. 17; and on Government's Exhibit No. 19 by the same writer who has filled in the body of the instrument and signed that instrument 'Joseph Edmond Marron,' and excluding the writing on the last two lines reading 'the 12th day of July, 1916, Charles S. Dolman'—I am not certain of that reading, but it is a notary's name.

Q. From the exhibits that I have shown you, I ask you have you arrived at any opinion as to who wrote on the slips of paper contained in Government's Exhibit 8? A. Yes.

Q. In whose handwriting did you conclude those slips were?

A. They are in the handwriting of the same writer who has signed the name and written the address on Government's Exhibit No. 18 which reads 'George L. Birdsall, 519 Belvedere Street.'

The COURT.—Those slips of paper were the slips of paper taken out of the gray ledger, Exhibit No. 1?

Mr. BONSALL.—Taken from the cash register, your Honor, on the day of the raid.

Q. Professor, will you explain, using your photographic [414] illustration, how you arrived at those conclusions—and will you put them on the blackboard?

A. I have placed on the board, at the left end, two photographic enlargements taken from pages at random in Government's Exhibit No. 1; one shows page 42 of this exhibit, and the other shows page 80 of this exhibit."

Without setting out in full detail the entire testimony of said witness respecting said Exhibits Nos. 1, 8, 17, 18 and 19, other than as appears above, said witness testified at considerable length as to how he arrived at the conclusions given by him in his said testimony, and while so doing introduced over the objection of the defendant Marron United States Exhibits Nos. 28, 29, 30, 31, 32, 33, 34 and 35, all being enlargements of portions of said Exhibits Nos. 1, 8, 17, 18 and 19.

To the entire testimony of the witness, Heinrich, the defendant Marron interposed a continuing objection, which objection was overruled by the Court."

To which ruling of the Court the defendant then and there duly and regularly excepted.

92.

The Court erred in not granting the following motion made on behalf of the defendant Marron because of the reception of incompetent and prejudicial matter received during the trial, which counsel for the plaintiff later moved to have stricken out. Said motion is as follows:

"Mr. SMITH.—So that the record may show the position taken by the defendant Marron, I at this time ask the Court to act upon a motion that I now make, to call the present proceeding a mistrial and to grant the defendant, Marron, a new trial forthwith, because of the reception of prejudicial matter.

The COURT.—If that is a motion, it is denied.

Mr. SMITH.—Exception." [415]

To which ruling of the Court the defendant then and there duly and regularly excepted.

93.

The Court erred in denying the motion of the defendant, Marron, for a directed verdict at the conclusion of plaintiff's case, at which time all of the evidence adduced had been presented.

To which ruling of the Court the defendant then and there duly and regularly excepted. [416]

94.

The Court erred in charging the jury as follows:

"A conspiracy cannot exist without a guilty intent being there present in the minds of the conspirators. Upon the question of intent on the part of the defendant, you are instructed that the law presumes that every person intends the actual and ordinary consequences of his act. Wrongful acts, knowingly or intentionally committed, cannot be justified on the ground of innocent intent. Ordinarily, the intent with which a man does a criminal act is not proclaimed by him; and, ordinarily, there is no direct evidence from which the jury may be satisfied from the declarations of the person, himself, as to what he intended when he did a certain act. This question of intent, like all other question of fact, is solely for the jury to determine from the evidence in the case."

To which ruling the defendant then and there duly and regularly excepted.

95.

The Court erred in charging the jury as follows:

"That on November 17, 1923, at 1249 Polk Street, former Police Officer Patrick Kissane received the sum of $5 from George Birdsall, *alias* George Howard, for the express purpose of furthering the said conspiracy, and with the intention so to do."

To which ruling the defendant then and there duly and regularly excepted.

96.

The Court erred in charging the jury as follows:

"That on March 31, 1924, former Police Sergeant Joseph Gorham received at 1249 Polk Street from George Birdsall, [417] *alias* George Howard, the sum of $90 for the purpose of furthering such conspiracy, and with the intention so to do."

To which ruling the defendant then and there duly and regularly excepted.

97.

The Court erred in charging the jury as follows:

"That in November, 1923, George Birdsall, *alias* George Howard, sold intoxicating liquor at 1249 Polk Street, in furtherance of said conspiracy, and with the intention so to do."

To which ruling the defendant then and there duly and regularly excepted.

98.

The Court erred in charging the jury as follows:

"That on May 15, 1924, Joseph E. Marron, *alias* Eddie Marron, maintained a nuisance at 1249 Polk

Street by keeping for sale on the premises at 1249 Polk Street intoxicating liquor in violation of the National Prohibition Act, in pursuance of said conspiracy, and with the intention to further the object of the same."

To which ruling the defendant then and there duly and regularly excepted.

99.

The Court erred in charging the jury as follows:

"That on May 15, 1924, George Birdsall, *alias* George Howard, maintained a common nuisance at 1249 Polk Street by selling liquor at 1249 Polk Street in violation of the National Prohibition Act, in pursuance of said conspiracy, and with the intention to further the object [418] of the same."

To which ruling the defendant then and there duly and regularly excepted.

100.

The Court erred in charging the jury as follows:

"In this regard, I charge you that if the Government has proven any one of the five overt acts mentioned, you are entitled to consider the testimony of the witness Nielsen, if you believe his testimony to be true, who testified as to making three trips to rum-running ships in the Pacific Ocean at the request of the defendant Marron, upon his order, and receiving three cargoes from the rum ships pursuant to the said orders, of his landing two boatloads of liquor in the City of San Francisco from such rum ships, pursuant to the orders obtained from the defendant Marron; and of his

testimony that he was paid $3 per case for liquor so transported from the rum-running vessels at the defendant Marron's request, at 1249 Polk Street, in the City of San Francisco, by the defendant Marron—as to whether or not a conspiracy was established as alleged in the indictment."

To which ruling the defendant then and there duly and regularly excepted.

101.

The Court erred in charging the jury as follows:

"Furthermore, if you find that the Government has proven one of the foregoing overt acts mentioned in the indictment, you are entitled to regard each of the entries in Government's Exhibit No. 1 made by the defendant Marron, if you find from the evidence, as a matter of fact, that they were entered by him, to be an overt [419] act in furtherance of the conspiracy alleged in the indictment."

To which ruling the defendant then and there duly and regularly excepted.

102.

The Court erred in charging the jury as follows:

"If you find from the evidence that the witness Vaughn prepared a summary of profits and loss at the end of each month at the request of Birdsall and with the knowledge of the defendant Marron from Government's Exhibit No. 1 in evidence, and you also find that the Government has established any one of the foregoing overt acts mentioned in

the indictment, you may regard this as evidence tending to establish the conspiracy set forth in the indictment."

To which ruling the defendant then and there duly and regularly excepted.

103.

The Court erred in charging the jury as follows:

"If you find from the evidence that the conspiracy is established only between co-conspirator George Birdsall and the defendant Marron, this would be sufficient to convict the defendant Marron, as it is not necessary that the Government connect all of the co-conspirators mentioned in the indictment in connection with the same."

To which ruling the defendant then and there duly and regularly excepted.

104.

The Court erred in refusing to give to the jury Instruction No. 1, which is as follows: [420]

"INSTRUCTION No. 1.

Gentlemen of the Jury, I charge you that as to the defendant, Joseph E. Marron, there is not sufficient evidence in support of a verdict of guilty, and I therefore instruct you to acquit the said defendant, Joseph E. Marron."

To which refusal to give such instruction the defendant then and there duly and regularly excepted.

105.

The Court erred in refusing to give to the jury Instruction No. 7, which is as follows:

"INSTRUCTION No. VII.

Circumstances of suspicion, no matter how great or strong are not proof of guilt, and the defendant must be found not guilty unless the facts establishing guilt are proved to a moral certainty and beyond a reasonable doubt."

To which refusal to give such instruction the defendant then and there duly and regularly excepted.

106.

The Court erred in refusing to give to the jury Instruction No. 15, which is as follows:

"INSTRUCTION No. XV.

Mere knowledge of the existence of a conspiracy on the part of a defendant does not make him a party to such conspiracy, but to find such a defendant guilty of the conspiracy charged you must be satisfied to a moral certainty and beyond a reasonable doubt that he not only had knowledge of, but actually participated in such conspiracy."

To which refusal to give such instruction the defendant then [421] and there duly and regularly excepted.

107.

The Court erred in refusing to give to the jury Instruction No. 19, which is as follows:

"INSTRUCTION No. XIX.

Under the indictment in this case the jury cannot find the defendant guilty of a violation or violations of the National Prohibition Act, no matter how well satisfied the jury may be as to the defendant having violated that Act, and in this connection I

charge you that should you find the defendant not guilty of the conspiracy charged in this indictment, such verdict of not guilty does not bar or prevent the Government from proceeding against him for any such violation of said National Prohibition Act notwithstanding your verdict in this case."

To which refusal to give such instruction the defendant then and there duly and regularly excepted.

108.

The Court erred in refusing to give to the jury Instruction No. 20, which is as follows:

"INSTRUCTION No. XX.

I charge you that before you can find the defendant Joseph E. Marron guilty of the offense charged in this indictment, you must first find that he was a party to the alleged conspiracy set out therein. If you have reasonable doubt as to whether or not he was a party to such alleged conspiracy, it will be your duty to return a verdict of not guilty as to him."

To which refusal to give such instruction the defendant then and there duly and regularly excepted. [422]

109.

The Court erred in refusing to give to the jury Instruction No. 21, which is as follows:

"INSTRUCTION No. XXI.

The Government in this case has depended to a great extent upon circumstantial evidence. While you are deliberating on evidence presented, you

must keep this rule of law in mind with respect to the manner in which circumstantial evidence must be treated. In order to find a verdict of guilty based upon circumstantial evidence you must find that the evidence is of such a character that it is not only consistent with the hypothesis of guilt, but you must also find that it is inconsistent with any other reasonable or rational hypothesis. The deductions to be drawn from the circumstances are for the jury, and where a circumstance that is relied upon the Government as incriminating is clearly compatible with innocence, you must find in favor of the defendant unless there are other circumstances sufficient to overcome the deduction of innocence from the particular circumstance. The rule may be stated briefly as follows: A theory cannot be said to be established by circumstantial evidence unless the facts relied upon are of such nature and so related to each other that it is the only conclusion that can fairly or reasonably be drawn from them. It is not sufficient that they be consistent merely with a certain theory, for it may well be that they are consistent with a certain theory and yet have no tendency to prove that theory. Therefore, if other conclusions may reasonably be drawn from the circumstances as related, the evidence submitted by the prosecution [423] will be sufficient to support a verdict of guilty.

Conjecture as to guilt is not sufficient, nor is the possibility of guilt from the mere existence of facts. If it appears from the testimony introduced by the prosecution that a conclusion other than guilty may

be reasonably reached by you, it is your duty to return a verdict of not guilty. In other words, if two inferences can be drawn from a given state of facts, one of guilt and one of innocence, it is your duty to draw the one of innocence in favor of the defendant and to return a verdict of not guilty.

Wilbur vs. Emergency Hospital, 27 Cal. App. 759."

To which refusal to give such instruction the defendant then and there duly and regularly excepted.

110.

The Court erred in refusing to give to the jury Instruction No. 22, which is as follows:

"INSTRUCTION No. XXII.

I charge you that participation in a conspiracy without knowledge of its existence or knowledge of a conspiracy without participation therein is not sufficient to warrant a conviction. Therefore if you find that the defendant Joseph E. Marron knew that this conspiracy was in being but did not participate therein you must find him not guilty. Likewise if you find that Joseph E. Marron took any part in this alleged conspiracy but did not have knowledge of its existence you must find him not guilty."

To which refusal to give such instruction the defendant then and there duly and regularly excepted. [424]

111.

The Court erred in refusing to give to the jury Instruction No. 23, which is as follows:

"INSTRUCTION No. XXIII.

You are instructed that the defendant is on trial for the single conspiracy set forth in the indictment. This is the only offense that you can consider in arriving at a verdict. In determ*ing* the guilt or innocence of the defendant you are absolutely limited to the offense and charge contained in the indictment in this case. The Court, therefore, directs you to disregard any other offense which any of the testimony may have a tendency to show and to confine yourselves wholly to the one offense set forth in the indictment."

To which refusal to give such instruction the defendant then and there duly and regularly excepted.

112.

The Court erred in refusing to give to the jury Instruction No. 24, which is as follows:

"INSTRUCTION No. XXIV.

There must be an intentional participation in the transaction with a view to the common design and purpose, before a party can be guilty of conspiracy.

U. S. vs. Nunnemacher, 27 Fed. Case No. 15,902."

To which refusal to give such instruction the defendant then and there duly and regularly excepted.

113.

The Court erred in refusing to give to the jury Instruction No. 25, which is as follows: [425]

"INSTRUCTION No. XXV.

Evidence that each of several defendants acted

illegally or maliciously with the same end in view will not support a charge of conspiracy, unless it appears that such acts were done pursuant to mutual agreement.

Newall vs. Jenkins, 26 Pac. 159."

To which refusal to give such instruction the defendant then and there duly and regularly excepted.

114.

The Court erred in refusing to give to the jury Instruction No. 26, which is as follows:

"INSTRUCTION No. XXVI.

You are instructed that an accomplice is a person who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.

You are further instructed that a conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to convict the defendant or defendants with the commission of the offense; and I further instruct you that the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof."

To which refusal to give such instruction the defendant then and there duly and regularly excepted.

115.

The Court erred in refusing to give to the jury Instruction No. 27, which is as follows: [426]

116.

"INSTRUCTION No. XXVII.

The Court instructs the jury that it is the law that mere passive knowledge of any illegal action, connected with this case, if any such be shown by the evidence, on the part of any person herein charged with the conspiracy alleged by the Government, is not sufficient to show complicity, in the said alleged conspiracy. Proof of some active participation on the part of any such person is necessary. Co-operation, in other words, must be shown, and there must be intentional participation in the alleged transaction with a view to the furtherance of the common design and purpose. To establish the connection of either of the defendants with the alleged conspiracy, such connection must be shown by facts or circumstances, independent of the declarations of others; that is, by his own acts, conduct or declarations.

Ryar vs. U. S., 216 Fed. 19, 20."

To which refusal to give such instruction the defendant then and there duly and regularly excepted.

117.

The Court erred in refusing to give to the jury Instruction No. 29, which is as follows:

"INSTRUCTION No. XXIX.

You are instructed that until and unless the fact that the defendant did participate in the alleged conspiracy is established by proof of facts and circumstances independent of the declarations of

others the defendant is not bound by the declarations or statements of such others."

To which refusal to give such instruction the defendant then [427] and there duly and regularly excepted.

118.

The Court erred in refusing to give to the jury Instruction No. 30, which is as follows:

"INSTRUCTION No. XXX.

And the jury should not rely upon it unsupported unless it produces in their minds the most positive conviction of its truth. If it does the jury should act upon it. It is just and proper in such cases for the jury to seek for corroborating facts and circumstances in other material respects; but this is not absolutely essential, provided the testimony of such witnesses produces in the minds of the jury full and complete conviction of its truth. But where corroborating evidence is required, or is sought by the jury, it is the law that testimony of one or more accomplices is not sufficient to corroborate the testimony of other accomplices."

To which refusal to give such instruction the defendant then and there duly and regularly excepted.

119.

The Court erred in refusing to give to the jury Instruction No. 31, which is as follows:

"INSTRUCTION No. XXXI.

I instruct you that a conviction for conspiracy cannot be had on the corroborated testimony of a

co-conspirator or accomplice, nor can co-conspirator or accomplices corroborate each other.

U. S. vs. Logan, 45 Fed. 872."

To which refusal to give such instruction the defendant then and there duly and regularly excepted. [428]

120.

The Court erred in refusing to give to the jury Instruction No. 32, which is as follows:

"INSTRUCTION No. XXXII.

You are instructed that anyone who is concerned in the commission of crime, either as a principal or an accessory, is an accomplice.

16 C. J. 671."

To which refusal to give such instruction the defendant then and there duly and regularly excepted.

121.

The Court erred in refusing to give to the jury Instruction No. 33, which is as follows:

"INSTRUCTION No. XXXIII.

You are cautioned against placing too much reliance upon testimony of accomplices, and the uncorroborated testimony of a confessed perpetrator of a crime contradicted under oath by himself, contradicted by other witnesses and inspired by the hope of immunity from punishment, is not only insufficient to establish the guilt of a defendant beyond a reasonable doubt but presents no substantial evidence of it.

509

Paraphrased from Syks vs. U. S., 204 Fed. 909, 8th Circ. and from McGinniss vs. U.S., 256 Fed. 621 at 626, 2nd Circ."

To which refusal to give such instruction the defendant then and there duly and regularly excepted.

122.

The Court erred in refusing to give to the jury Instruction No. 34, which is as follows:

"INSTRUCTION No. XXXIV. [429]

You are instructed that while 'conviction may be had in the Federal Courts upon the uncorroborated evidence of an accomplice, if the story, as told is straight-forward and has a ring of truth and indicates unequivocally the guilt of the accused,' your attention nevertheless is 'cautiously and sharply' directed 'to the exercise of care and caution in viewing such evidence and that the testimony of the accomplice be convincing proof of the guilt of the accused' before you believe it.

McGinnis vs. U. S., 256 Fed. 621, at 626."

To which refusal to give such instruction the defendant then and there duly and regularly excepted.

123.

The Court erred in refusing to give to the jury Instruction No. 35, which is as follows:

"INSTRUCTION No. XXXV.

You are cautioned against placing too much reliance upon the testimony of accomplices and you may require corroborating testimony before giving credence to it.

Holmgren vs. U. S., 217 U. S. 509, 54 L. Ed. 861;

U. S. vs. Murphy, 253 Fed. 404, Dis. Court, N. Y."

To which refusal to give such instruction the defendant then and there duly and regularly excepted.

124.

The Court erred in using its judicial discretion in denying the motion of the defendant for a new trial, and in this connection in refusing to hold and decide as next hereinafter set forth:

"1. That the verdict is contrary to the evidence. [430]

2. That the verdict is contrary to the weight of the evidence.

3. That the verdict is contrary to the law as given to the jury by the Court.

4. That the Court erred in refusing defendant Joseph E. Marron special instructions, Nos. 1, 7, 15, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, 31, 32, 34, 35.

5. That the Court erred in so much of its general charge as is left to the jury to determine whether or not the defendant, here, was the party to the, or any, conspiracy as charged in the indictment.

6. That the Court erred in admitting evidence contrary to law.

7. That new and material facts have come to light since the trial.

8. That other errors at law appeared upon the trial, prejudicial to defendant. (85)

9. That errors at law occurred during the trial of the case in admitting evidence prior to June, 1923, and subsequent to October 3, 1924, which were duly excepted to by the defendant.

10. Errors of law occurring at the trial and excepted to by the defendant.

11. Further, on the ground of newly discovered evidence."

To which denial and refusal the defendant then and there duly and regularly excepted.

125.

The Court erred in refusing the motion of the defendant in arrest of judgment, in the following particulars: [431]

"1. That said indictment does not charge any offense against the laws of the United States nor does it charge said defendant with the doing of anything, the doing of which is forbidden by the laws of the United States.

2. That said indictment does not set forth any facts sufficient in law to constitute a conviction.

3. That there is no fact or circumstance stated therein to advise the Court that an offense has been committed against the United States.

4. That evidence against this defendant has been received and considered there on matters pertaining to former jeopardy after said jeopardy had already attached as to each of them.

5. That said indictment fails to set forth every element of the offense intended to be charged.

6. That it does not set forth any facts sufficient (89) in laws to support a conviction.

7. That this defendant has been convicted without due process of law, and in violation of Articles IV, V, and VI of Amendments of the Constitution of the United States."

To which refusal the defendant then and there duly and regularly excepted.

126.

The Court erred in imposing sentence and judgment upon the defendant, Joseph E. Marron, in the penitentiary for two years, and that he be fined the sum of Ten Thousand Dollars, to which the defendant, Joseph E. Marron, then and there duly and regularly excepted. [432]

That the judgment and sentence as to the defendant Joseph E. Marron is wholly inconsistent by any evidence showing or tending to show that the said defendant Joseph E. Marron combined, confederated, conspired or agreed with any other defendants in the said indictment named, or with any other persons, or at all, in the City and County of San Francisco and within the jurisdiction of the above-entitled court, or otherwise, or at all, to violate the Act of Congress of October 28, 1919, to wit, National Prohibition Act, or in violation of any law of the United States, and to which the defendant Joseph E. Marron then and there duly and regularly excepted.

That the introduction in evidence of all the papers, records, files, and particularly United States Exhibit No. 1, over the objection of the defendant

Joseph E. Marron, was and is in violation of the Fourth and Fifth Amendments to the Constitution of the United States, and was in contravention of his constitutional rights guaranteed him under the said Constitution of the United States, to which the defendant then and there duly and regularly excepted.

That the search and seizure made at the premises 1249 Polk Street was without color or without right, in that the said documents, writings, books and records were not described or otherwise identified or referred to in that certain search-warrant introduced in evidence as Defendant's Exhibit No. 1, and to which the defendant then and there duly and regularly excepted.

That the search and seizure made at the premises 1249 Polk Street was without color or without right, in that the said documents, writings, books and records were not described or otherwise identified or referred to in that certain search-warrant introduced [433] in evidence as Defendant's Exhibit No. 1, and to which the defendant then and there duly and regularly excepted. (531.)

WHEREAS, by the law of the land said judgment ought to be given for Joseph E. Marron, and against the United States of America, defendant in error, said plaintiff in error, Joseph E. Marron does now pray the judgment herein rendered against him, to be reversed and annulled, and altogether held for nothing, and the sentence herein imposed upon him to be set aside and held for naught, and that he be restored to all things which

he has lost by occasion of the said judgment, and that he be afforded such and any and all relief as may be meet in the premises.

Dated: San Francisco, California, May 1926.

HUGH L. SMITH,
CHAS. J. WISEMAN,
Attorneys for Said Defendant Joseph E. Marron.

[Endorsed]: Receipt of copy of the within assignment of errors is hereby admitted this 4 day of May, 1926.

GEO. J. HATFIELD,
Attorney for Plaintiff.

Filed May 4, 1926. [434]

[Title of Court and Cause.]

ORDER ALLOWING WRIT OF ERROR, STAYING SENTENCE AND EXECUTION, ETC. (JOSEPH E. MARRON).

Now comes Joseph E. Marron, the defendant herein, and files herein and presents to the Court his petition praying for the allowance of a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit, to have the above-entitled court and submit herewith the assignment of errors intended to be urged by them; praying also that a transcript of the record, proceedings and papers in this cause, duly authenticated, be sent to the said United States Circuit Court of Appeals for the Ninth Circuit; and praying also that meanwhile all further proceedings in the above-entitled

District Court be suspended, stayed and superseded, and that sentence and execution herein be stayed until the final disposition of said writ of error in the aforesaid United States Circuit Court of Appeals.

NOW, THEREFORE, in consideration of the premises, and the Court being fully advised, and the said defendant having heretofore submitted to the above-entitled court his bond for appearance in the United States District Court for [435] Northern District of California, or in the United States Circuit Court of Appeals for the Ninth Circuit, or in the Supreme Court of the United States, as may hereafter in this case be ordered, in the sums following, to wit: Defendant, Joseph E. Marron in the sum of Ten Thousand Dollars ($10,000), which said sum being the amount of bail heretofore fixed by this Court for said defendant, and the said bond having been heretofore accepted and approved by this Court.

IT IS HEREBY ORDERED that the aforesaid writ of error be and the same is hereby allowed.

AND IT IS FURTHER ORDERED that the transcript of the record, proceedings and papers in this cause, duly authenticated, be sent to the aforesaid United States Circuit Court of Appeals for the Ninth Circuit.

AND IT IS FURTHER ORDERED that sentence and execution herein be stayed until the final disposition of said writ of error in the aforesaid United States Circuit Court of Appeals for the Ninth Circuit.

AND IT IS FURTHER ORDERED that the bond for costs upon the writ of error herein be and it is hereby fixed at the sum of Two Hundred and Fifty Dollars ($250.00).

Dated: May 4th, 1926.

FRANK H. KERRIGAN,

Judge of the United States District Court for the Northern District of California.

[Endorsed]: Filed May 4, 1926. [436]

[Title of Court and Cause.]

SUPERSEDEAS BOND (JOSEPH E. MARRON).

KNOW ALL MEN BY THESE PRESENTS, that we, Joseph E. Marron, of the City and County of San Francisco, as principal, and Aloysius I. O'Brien and Genevieve M. O'Brien and Aladino Pisani and Theresa Pisani, as sureties, are held and firmly bound unto the United States of America in the sum of Ten Thousand Dollars ($10,000), lawful money of the United States of America, to be paid to the United States of America, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 4th day of May, 1926.

WHEREAS, lately at a term of the Southern Division of the United States District Court, for the Northern District of California, in a suit pend-

ing in said court between the United States of America, and Joseph E. Marron et al., defendants, a judgment and sentence was made, given, rendered, and entered against the said defendant, Joseph E. Marron, said defendant having obtained a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit, to reverse said judgment and sentence and a citation directed to the United States of America to be and appear in the said United States Circuit Court of [437] Appeals for the Ninth Circuit of the State of California, pursuant to the terms, and at the time fixed in said citation, which citation has been duly served.

Now, the condition of the above obligation is such, that if the said Joseph E. Marron shall appear either in person or by attorney in the United States Circuit Court of Appeals for the Ninth Circuit, on such day or days as may be appointed for hearing of said cause in said court and prosecute his writ of error, and if the said Joseph E. Marron shall abide by and obey all order*ed* made by the United States Circuit Court of Appeals for the Ninth Circuit in said cause, and shall surrender himself in execution of said judgment and sentence as said Court may direct, if the judgment and sentence against him shall be affirmed; and if he shall appear for trial in the District Court of the United States, for the Northern District of California, on such day or days as may be appointed for the retrial by said District Court, and abide by said Court, provided the judgment and sentence against

him shall have been reversed by the United States Circuit Court of Appeals for the Ninth Circuit, then the above obligation is to be void; otherwise to remain in full force.

JOSEPH E. MARRON,
Principal.
GENEVIEVE M. O'BRIEN,
ALOYSIUS I. O'BRIEN,
THERESA PISANI,
ALADINO PISANI,
Sureties.

Signed, sealed, and acknowledged before me this 4th day of May, 1926.

[Seal] FRANCIS KRULL,
United States Commissioner, Northern District of California, at San Francisco. [438]

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

Aloysius I. O'Brien and Genevieve O'Brien and Aladino Pisani and Theresa Pisani, being duly sworn, each for himself says: That he is a resident and householder in said Northern District of California, and is worth in property situate therein the sum of Ten Thousand Two Hundred Fifty Dollars, over and above all of his just debts and liabilities, exclusive of property exempt from execution.

GENEVIEVE M. O'BRIEN.
ALOYSIUS I. O'BRIEN.
THERESA PISANI.
ALADINO PISANI.

Subscribed and sworn to before me this 4th day of May, 1926.

[Seal] FRANCIS KRULL,

United States Commissioner, Northern District of California, at San Francisco.

O. K. as to form.

T. J. SHERIDAN. [439]

United States of America,
Northern District of California,—ss.

Genevieve O'Brien, whose name is subscribed to the foregoing undertaking as one of the sureties thereof, being first duly sworn, deposes and says:

That I am a householder in said District and reside at No. 2158 Bush Street, in the City of San Francisco, State of California, and by occupation a housewife.

That I am worth the sum of Ten Thousand Two Hundred Fifty Dollars, the sum in the said undertaking specified as the penalty thereof, over and above all my debts and liabilities and that my property, now standing of record in my name, consists in part as follows:

Real estate consisting of business property, 2014 to 2022 Fillmore St.

Two flats—2156–8 Bush St., San Francisco Cal., $36,000.00. My interest in above property, less encumbrances, is $13,000 net.

That the encumbrances on the foregoing property are as follows:

Mortgage on Fillmore property, $6,000.00.

That my total assets, above all liabilities and obligations on other bonds, is the sum of $15,000.

That I am not surety upon outstanding penal bonds now in force, aggregating total penalty $———.

GENEVIEVE M. O'BRIEN. (Seal)
ALOYSIUS I. O'BRIEN (Her Husband).

Subscribed and sworn to before me this 4th day of May, 1926.

[Seal] FRANCIS KRULL,
United States Commissioner for the Northern District of California. [440]

United States of America,
Northern District of California,—ss.

Aladino Pisani and Theresa Pisani, whose names are subscribed to the foregoing undertaking as one of the sureties thereof, being first duly sworn, deposes and says:

That I am a householder in said District and reside at No. 2463 Sacramento Street, in the City of San Francisco, State of California, and by occupation housewife.

That I am worth the sum of Ten Thousand Two Hundred and Fifty Dollars, the sum in the said undertaking specified as the penalty thereof, over and above all my debts and liabilities and exclusive of property exempt from execution and that my property, now standing of record in my name, consists in part as follows:

Real estate consisting of 2457 to 2467 Sacramento St., S. F., Cal., being six flats, value $24,000.

⅓ interest in flats, 2156–8 Bush St., San Francisco, value $3,000.

That the encumbrances on the foregoing property are as follows:

Mtge. on Sacto. St. property of $8,000.

That my total net assets, above all liabilities and obligations on other bond, is the sum of $19,000.

That we are not surety upon outstanding penal bonds now in force, aggregating total penalty, $———.

THERESA PISANI. (Seal)
ALADINO PISANI.

Subscribed and sworn to before me this 4th day of May, A. D. 1926.

[Seal] FRANCIS KRULL,
United States Commissioner for the Northern District of California.

Approved as to sufficiency of sureties.

FRANCIS KRULL,
U. S. Commissioner, Northern District of California, at S. F. [441]

[Endoresd]: Filed May 5, 1926. [442]

BOND FOR COSTS ON WRIT OF ERROR.

KNOW ALL MEN BY THESE PRESENTS, That we, Joseph E. Marron, as principal, and Genevieve M. O'Brien and Theresa Pisani, as sureties, are held and firmly bound unto the United States of America in the full and just sum of Two Hundred and Fifty Dollars, to be paid to the said United States of America certain attorney, executors, administrators or assigns; to which payment,

well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 4th day of May, in the year of our Lord One Thousand Nine Hundred and Twenty-six.

WHEREAS, lately at a District Court of the United States for the Northern District of California, in a suit depending in said court, between United States of America and Joseph E. Marron, a judgment was rendered against the said defendant Joseph E. Marron and the said defendant having obtained from said court a writ of error to reverse the said judgment in the aforesaid suit, and a citation directed to the said U. S. of America citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California.

Now, the condition of the above obligation is such, that if the said Joseph E. Marron shall prosecute to effect, and answer all damages and costs if he fail to make said plea good, then the above obligation to be void; else to remain in full force and virtue.

JOSEPH E. MARRON. (Seal)
GENEVIEVE M. O'BRIEN. (Seal)
THERESA PISANI. (Seal)

Acknowledged before me the day and year first above written.

[Seal] FRANCIS KRULL,
U. S. Commissioner of the State of California, at San Francisco. [443]

[Endorsed]:

United States of America,
Northern District of California,—ss.

Genevieve M. O'Brien and Theresa Pisani, being duly sworn, each for *him*self, deposes and says, that *he* is a freeholder in said District, and is worth the sum of Two Hundred and Fifty Dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

GENEVIEVE M. O'BRIEN.
THERESA PISANI.

Subscribed and sworn to before me, this 4th day of May, A. D. 1926.

[Seal] FRANCIS KRULL,
U. S. Commissioner, Northern District of California, at S. F.

O. K.—SHERIDAN.

Filed May 5, 1926. [444]

[Title of Court and Cause.]

ORDER FOR TRANSFER OF ORIGINAL EXHIBITS.

In accordance with the stipulation entered into between counsel for both parties, and incorporated

in the engrossed bill of exceptions herein, it is hereby,

ORDERED, that all the exhibits introduced in the above-entitled action in their original form be marked by the Clerk and filed in the office of the Clerk of the United States Circuit Court of Appeals, for the Ninth District.

Dated: August 7, 1926.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Filed Aug. 7, 1926. [445]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT ON WRIT OF ERROR.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 445 pages, numbered from 1 to 445, inclusive, contain a full, true and correct transcript of the records and proceedings in the case of United States of America vs. Joseph E. Marron, No. 15708, as the same now remain on file and of record in this office.

I further certify that the cost for preparing and certifying the foregoing transcript on writ of error is the sum of Eighty-eight Dollars and Ninety Cents ($88.90), and that the same has been paid to me by the attorney for the plaintiff in error herein.

Annexed hereto are the original writ of error, re-

turn to writ of error, and the original citation on writ of error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 20th day of August, A. D. 1926.

[Seal] WALTER B. MALING,
Clerk.
By C. M. Taylor,
Deputy Clerk. [446]

WRIT OF ERROR.

United States of America,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United Sta[illegible]for the Northern District of California, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Joseph E. Marron and United States of America, defendant in error, a manifest error hath happened, to the great damage of the said Joseph E. Marron, plaintiff in error, as by its complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with

all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, the 4th day of May, in the year of our Lord one thousand nine hundred and twenty-six.

[Seal] WALTER B. MALING,
Clerk of the United States District Court, Northern District of California.

By C. W. Calbreath,
Deputy Clerk.

Allowed by:

FRANK H. KERRIGAN,
United States District Judge. [447]

[Endorsed]: Filed May 4, 1926.

RETURN TO WRIT OF ERROR.

The answer of the Judges of the United States District Court, for the Northern District of California, to the within writ of error:

As within we are commanded, we certify under the seal of our said District Court, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, within mentioned, at the day and place within contained.

We further certify that a copy of this writ was on the 9th day of August, A. D. 1926, duly lodged in the case in this court for the within named plaintiff in error.

By the Court:

[Seal] WALTER B. MALING,

Clerk, U. S. District Court, Northern Dist. of Calif.

By C. M. Taylor,

Deputy Clerk. [448]

CITATION ON WRIT OF ERROR.

United States of America,—ss.

The President of the United States, to United States of America, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's office of the United States District Court for the Northern District of California,

wherein Joseph E. Marron is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable A. F. ST. SURE, United States —— Judge for the Northern District of California, this 4th day of May, A. D. 1926.

FRANK H. KERRIGAN,
United States District Judge. [449]

United States of America,—ss.

On this 4th day of May, in the year of our Lord one thousand nine hundred and '26, personally appeared before me, Chas. J. Wiseman, the subscriber, ——, and makes oath that he delivered a true copy of the within citation to the United States Attorney.

CHAS. J. WISEMAN.

Recd. copy May 4, 1926.

GEO. J. HATFIELD,
U. S. Atty.

[Endorsed]: Filed May 4, 1926.

[Endorsed]: No. 4948. United States Circuit Court of Appeals for the Ninth Circuit. Joseph E. Marron, Plaintiff in Error, vs. United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Divi-

sion of the United States District Court of the Northern District of California, First Division.

Filed August 20, 1926.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

[Endorsed]: Printed Transcript of Record. Filed Oct. 1, 1926. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

No. 4948

United States
Circuit Court of Appeals
For the Ninth Circuit.

JOSEPH E. MARRON,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, First Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated term, to wit, the October Term, A. D. 1926, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the city and county of San Francisco, in the State of California, on Wednesday, the seventeenth day of November, in the year of our Lord one thousand nine hundred and twenty-six. Present: Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; Honorable FRANK H. RUDKIN, Circuit Judge; Honorable WILLIAM P. JAMES, District Judge.

No. 4948.

JOSEPH E. MARRON,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

ORDER OF SUBMISSION.

ORDERED above-entitled cause argued by Mr. Hugh L. Smith, counsel for the plaintiff in error, and by Mr. T. J. Sheridan, Assistant United States Attorney, counsel for the defendant in error, and submitted to the Court for consideration and decision.

At a stated term, to wit, the October Term, A. D. 1926, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the city and county of San Francisco, in the State of California, on Monday, the thirteenth day of December, in the year of our Lord one thousand nine hundred and twenty-six. Present: Honorable WILLIAM H. HUNT, Circuit Judge, Presiding; Honorable FRANK H. RUDKIN, Circuit Judge.

No. 4948.

JOSEPH E. MARRON,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT.

By direction of the Honorable William B. Gilbert and Frank H. Rudkin, Circuit Judges, and William P. James, District Judge, before whom the cause was heard, ORDERED that the typewritten opinion this day rendered by this Court in the above-entitled cause be forthwith filed by the Clerk and that a judgment be filed and recorded in the minutes of this Court in accordance with the opinion filed.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 4948.

JOSEPH E. MARRON,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

OPINION U. S. CIRCUIT COURT OF APPEALS.

Upon Writ of Error to the Southern Division of the United States District Court for the Northern District of California.

Before: GILBERT and RUDKIN, Circuit Judges, and JAMES, District Judge.

JAMES, District Judge:

This case is brought here by writ of error, under which the plaintiff seeks to have set aside the judgment entered against him upon conviction of the crime of conspiring to violate provisions of the National Prohibition Act. Plaintiff in error was convicted of the same offense under the same indictment prior to his last trial. That judgment was reversed by this Court. (Marron vs. United States, 8 F. (2d) 251.) The reversal was ordered because the Court concluded that the evidence received touching the seizure of intoxicating liquor without

a search-warrant at 2922 Sacramento Street, San Francisco, was not admissible.

The indictment in substance charged the conspiracy to be one to manufacture, sell, transfer, deliver, transport, furnish and have possession of intoxicating liquors, and to maintain a common nuisance by keeping for sale and selling such liquors at 1249 Polk Street, in the city and county of San Francisco.

The first point urged is that the Court erred, and that because of such error rights of plaintiff in error under the Fourth and Fifth Amendments to the Constitution were violated, in receiving in evidence a book of account and papers and documents of the accused. The argument to this point is directed solely to the alleged unlawfulness of the search made by the Federal officers of the premises at 1249 Polk Street, as a result of which in addition to a large amount of intoxicating liquors, a book of account and several other papers were taken. The competency of the evidence except for the complaint that it was illegally procured is not presented.

The particular item of a documentary nature which the search disclosed was a book of account referred to on the former hearing in this court and at the last trial as the "gray ledger." This Court on the previous review held that there was no error in receiving in evidence the ledger. The evidence showing the authority of the officers who made the search, and the circumstances of the search, is admitted to have been the same at the last trial as at the former one. Where the evidence is the same,

and the charge identical, a final decision on appeal establishes the rule, or law of the case, which will govern the second trial. And the former decision made by this Court will be binding now. Counsel for plaintiff in error admit that the District Court made its ruling at the second trial in conformity with the decision rendered on the first writ of error, and with fairness state that they repeat the contention as to the validity of the search only for the purpose of protecting their position until the final determination of the case; unless the Court may be persuaded to recede from its earlier view. We conclude at once that the former decision on the same point, made under the same charge on the same evidence, forecloses argument on the question. Hence the District Judge did not err in denying the motion to suppress the evidence referred to.

The rulings of the District Court in admitting the testimony of the witness Walter Brand and Jens Neilsen over the objections of the accused and in advising the jury that it might consider that evidence are assigned as error. The evidence showed that Marron was the lessee of the flat at 1249 Polk Street, and it fairly showed that he was the principal owner of the business of keeping and selling various kinds of intoxicating liquors therein from about September, 1923, until about the 1st of October, 1924. Brand had been the immediate predecessor of Marron in the business. He was first allowed to testify as to sales of liquor made there prior to the time that Marron took charge, and he also identified a number of items in the gray

ledger as having been made by him, not in Marron's presence and not at the latter's direction. This testimony was objected to and the objection was first overruled, but the testimony was later stricken out at the motion of the district attorney. The Judge both at the time of the granting of the motion to strike and at the conclusion of the evidence instructed the jury to disregard the matter objected to. It is counsel's contention that the testimony being improper and incompetent, its admission was prejudicial to the accused, and that the error was not cured by the giving of the instruction to the jury that the testimony was to be disregarded. It is argued primarily that every error is deemed to be prejudicial. Such a presumption does not arise. In Simpson vs. United States, 289 Fed. 188, this Court speaking through Judge Gilbert said: "In reviewing a judgment in an appellate court, the burden is on the plaintiff in error to show that error in the admission of testimony was prejudicial," citing Rich vs. United States, 271 Fed. 566; Trope vs. United States, 276 Fed. 348; Haywood vs. United States, 268 Fed. 795. Admitting that had the testimony been allowed to remain with the jury the effect would have been to prejudice the defendant in his right to a fair trial, still it cannot be said in this case that the instruction of the Court, twice given, was not sufficient to prevent any consideration being had of it. The presumption is that the jury will regard and obey the instructions of the Judge. Pennsylvania Company vs. Roy, 102 U. S. 451. And where there is ample evidence to establish the

guilt of a defendant and sustain a verdict, Courts are not ready to indulge in finely drawn speculations to sustain a claim of prejudice made where rulings like the one here considered are called into question. There was plain evidence to show Marron's connection with the flat and with the unlawful business at 1249 Polk Street between the dates mentioned. He was the lessee of the premises and the evidence was sufficient to show that a large number of items in the gray ledger were written by him. And it was equally clear that these items constituted a part of the bookkeeping concerning the unlawful business being conducted at the Polk Street address. Prejudice is not shown on account of this alleged error.

The Court allowed the Government to show by Jens Neilsen that the witness had, in March, 1924, and on another occasion later, but within the time that Marron was concerned with the liquor selling business at the Polk Street number, brought intoxicating liquor from a ship to Polk Street and had been paid by Marron for that service. Under the charges made in the indictment, it was competent for the Government to prove the conduct of Marron during all of the time that he was managing the Polk Street business which tended to show what intoxicating liquor he was keeping there and selling; and evidence of the procuring of the liquor and the delivery thereof to the Polk Street establishment, and the payment to a person hired by Marron to deliver it of money for the service, was certainly competent as part and parcel of the proof

required to be made. The matters about which Neilsen testified were all of that nature and there was no error in receiving the testimony.

The instructions to the jury referred to in the statement of contentions as made by counsel for plaintiff in their brief seem to be correct and pertinent under the evidence.

The judgment is affirmed.

[Endorsed]: Opinion. Filed Dec. 13, 1926. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 4948.

JOSEPH E. MARRON,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

JUDGMENT.

In Error to the Southern Division of the District Court of the United States for the Northern District of California, First Division.

This cause came on to be heard on the transcript of the record from the Southern Division of the District Court of the United States for the Northern District of California, First Division, and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed.

[Endorsed]: Judgment. Filed and entered Dec. 13, 1926. Frank D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

At a stated term, to wit, the October Term, A. D. 1926, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the city and county of San Francisco, in the State of California, on Monday, the thirty-first day of January, in the year of our Lord one thousand nine hundred and twenty-seven. Present: Honorable FRANK H. RUDKIN, Circuit Judge, Presiding; Honorable FRANK H. KERRIGAN, District Judge.

No. 4948.

JOSEPH E. MARRON,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

ORDER DENYING PETITION FOR A REHEARING.

Upon consideration thereof, and by direction of the Honorable William B. Gilbert and Frank H.

Rudkin, Circuit Judges, and William P. James, District Judge, before whom the cause was heard, IT IS ORDERED that the petition, filed January 11, 1927, on behalf of the plaintiff in error for a rehearing of the above-entitled cause be, and hereby is denied.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 4948.

JOSEPH E. MARRON,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

ORDER STAYING ISSUANCE OF MANDATE, Etc.

Upon consideration of the application of Mr. Hugh L. Smith, counsel for the plaintiff in error in above cause, and good cause therefor appearing, IT IS ORDERED that the issuance, under Rule 32, of the mandate of this Court in the above-entitled cause be, and hereby is stayed until after the Supreme Court of the United States passes upon the petition for a writ of certiorari to be hereafter made by the plaintiff in error herein, on condition that the said petition be docketed in the Clerk's office of the said Supreme Court on or before February 28, 1927.

Dated: San Francisco, California, February 3, 1927.

FRANK H. RUDKIN,
U. S. Circuit Judge.

[Endorsed]: No. 4948. United States Circuit Court of Appeals for the Ninth Circuit. Filed Feb. 3, 1927. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 4948.

JOSEPH E. MARRON,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 35 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, F. D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing five hundred forty-three (543) pages, numbered from and including 1 to and including 543, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the plaintiff in error and certified under Rule 35 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 8th day of February, A. D. 1927.

[Seal]

F. D. MONCKTON,
Clerk.
By Paul P. O'Brien,
Deputy Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 18, 1927

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(7403)